APPENDIX

Supreme Court, U. S.
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MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6038

JAMES EDWARD DROPE,

Petitioner,

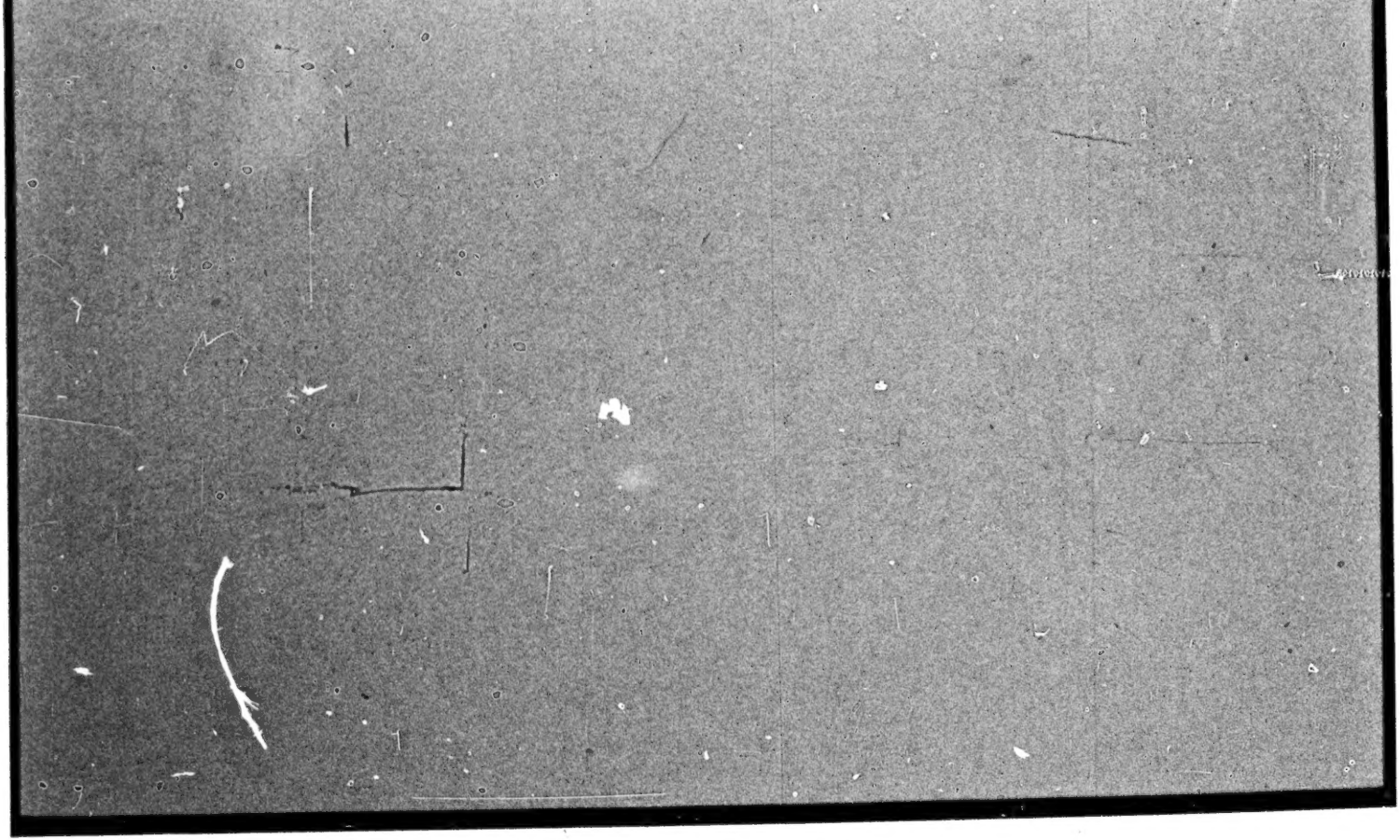
—v.—

STATE OF MISSOURI,

Respondent.

ON WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, ST. LOUIS DISTRICT

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 5, 1974; CERTIORARI AND FORMA PAUPERIS GRANTED MAY 13, 1974.



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IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 405R

STATE OF MISSOURI, PLAINTIFF

vs.

JAMES E. DROPE, DEFENDANT

RELEVANT DOCKET ENTRIES

1969	
February 26	Indictment filed.
April 14	Cause continued for defendant James E. Drope to May 26, 1969.
May 27	Defendant files motion for psychiatric examination. State of Missouri files memorandum stating it does not oppose the motion for a psychiatric examination of defendant James E. Drope.
June 23	Cause assigned to Division No. 19 for trial. Defendant present in court, but his attorney, Lester Watson, was not present. State present by Mike Frank. Cause having been assigned to Division No. 19 and the court having waited from 10:45 a.m. to 2:00 p.m. and the defendant having been present and a panel of 60 jurors present and Lester Watson having failed to appear and the court being advised that Lester Watson is aware of the case being on today's docket, it is ordered that Sheriff seek out the said Lester Watson at this time. Lester Watson arrives at 3:15 p.m. Defendant present in court with his attorney, Lester Watson. State by Mike Frank. Examination of jurors voir dire begun. Not completed. Cause recessed until Tuesday, June 24, 1969 at 10:00 a.m.

Relevant Docket Entries

1969

June 24 — Trial proceeds. Defendant present in court with his attorney, Lester Watson. State by Mike Frank. Examination of jurors voir dire begun, continued and selected. Jury sworn. Instruction given. Opening statement made by the State. Defense reserves the right to make opening statement at this time. Testimony for State begun, not completed. Trial recessed until Wednesday, June 25, 1969 at 9:30 a.m.

June 25 — Trial proceeds. Defendant not present in court with his attorney, Lester Watson. The court being informed that the defendant James E. Drope is in the hospital as the result of a self-inflicted gunshot wound. Defendant's attorney, Lester Watson, moves for a mistrial which was overruled. Trial proceeds with defendant, James E. Drope, not present. Trial progressed. Testimony for State being heard and completed. Out of the hearing of the jury defendant's prior conviction read by the court clerk. The court finds defendant's prior convictions. Defendant's attorney files motion for verdict of acquittal. Presented and overruled. Jury instructed not to separate. Instructions read. Arguments of counsel made. Sheriff sworn and cause given to the jury. Verdict of the jury. Guilty of rape. Verdict received. Jury polled. Defendant ordered to custody of Sheriff. Defendant was in the hospital when remanded to Sheriff. Defendant's bond set at $25,000.

July 21 — In accordance with the verdict of the jury and court's findings the punishment of defendant is assessed at imprisonment in the penitentiary for the remainder of his natural life.

July 30 — Defendant's motion for a new trial filed. Set for hearing on September 19, 1969.

RELEVANT DOCKET ENTRIES

1969	
September 19	Evidence offered by defendant on motion for new trial. Further proceedings to be heard by court on October 3, 1969.
October 3	Motion on hearing for new trial heard and to be taken as submitted on filing of last brief. Defendant allowed 10 days to file and state allowed 5 days to answer.
October 15	Defendant's motion for new trial overruled and sentencing set for Tuesday, October 21, 1969 at 9:15 a.m.
October 21	Allocution granted. Defendant sentenced to Department of Corrections for remainder of his natural life.
1970	
March 12	Defendant with special leave of Court, files notice of appeal to Supreme Court of Missouri.
1971	
January 11	Opinion of Supreme Court of Missouri affirming judgment filed.

IN THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Case No. PCR 294

JAMES EDWARD DROPE, MOVANT

vs.

STATE OF MISSOURI, RESPONDENT

RELEVANT DOCKET ENTRIES

1971	
April 22	Defendant's affidavit in forma pauperis is filed and granted. Motion to set aside judgment and sentence under Supreme Court Rule 27.26 is filed and assigned to Division No. 19 as Case P.C.R. Number 294 to be heard by Judge David McMullan. Richard D. Hatton appointed attorney for movant.
April 28	Appointment of Richard D. Hatton set aside. Elmer H. Grimm appointed attorney for movant.
May 11	Appointment of Elmer H. Grimm set aside and John J. Goebel appointed attorney for movant.
May 14	Charles A. Weiss enters his appearance as co-counsel with John J. Goebel as appointed attorney for movant.
July 21	PCR hearing convened and progresses. Continued for purpose of taking and filing deposition. Defendant granted 30 days for filing brief. State granted 30 days to answer. Motion to be taken as submitted on filing of last brief.
1972	
June 26	Movant's motion filed pursuant to Missouri Supreme Court Rule 27.26 overruled. Findings of fact, conclusions of law and ruling filed.
July 7	Movant files notice of appeal to Missouri Court of Appeals, St. Louis District.

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

No. 34,797

JAMES EDWARD DROPE, APPELLANT

v.

STATE OF MISSOURI, RESPONDENT

RELEVANT DOCKET ENTRIES

1973	
March 5	Cause argued and submitted.
June 5	Opinion filed upholding finding of Circuit Court in overruling appellant's motion filed pursuant to Missouri Supreme Court Rule 27.26.
June 15	Appellant's motion for rehearing or to transfer to Missouri Supreme Court filed.
August 16	Appellant's motion for rehearing or transfer to Missouri Supreme Court denied.
September 13	Copy of appellant's application for transfer to Supreme Court of Missouri filed.
October 9	Supreme Court of Missouri's order denying appellant's application to transfer filed.
1974	
January 7	Letter filed notifying court that appellant filed with the United States Supreme Court a petition for writ of certiorari to Missouri Court of Appeals, St. Louis District.

"CIRCUIT COURT, CITY OF ST. LOUIS,
FEBRUARY TERM, 1969

INDICTMENT—Filed February 26, 1969

"THE GRAND JURORS OF THE STATE OF MISSOURI, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present, That JAMES EDWARD DROPE alias EDWARD DROPE on the 2nd day of June, one thousand nine hundred and fifty-eight, at the City of St. Louis aforesaid, in the Circuit Court was duly convicted of the offense of Burglary Second Degree and Stealing, and in accordance with said conviction was duly sentenced by said Court to an imprisonment in the Penitentiary of the State of Missouri for the term of two years for Burglary Second Degree and two years for Stealing to run consecutively for a total of four years and was duly imprisoned in the said Penitentiary of the State of Missouri aforesaid, on July 2, 1958, in accordance with said sentence; and that the said JAMES EDWARD DROPE alias EDWARD DROPE was duly discharged from said Penitentiary of the State of Missouri aforesaid, on February 25, 1961, after and upon lawful compliance with said sentence.

"THE GRAND JURORS OF THE STATE OF MISSOURI, within and for the body of the City of St. Louis, now here in Court, duly impaneled, sworn and charged, upon their oath present further as follows:

"That JAMES EDWARD DROPE alias EDWARD DROPE, RABORN EUGENE TUTTLE and ROGER DERYL BUTLER at the City of St. Louis, State of Missouri, on the 17th day of January, 1969, did unlawfully and feloniously make an assault upon MARY JOYCE DROPE, a female over the age of sixteen years and did then and there unlawfully, feloniously and forcibly rape, ravish and carnally know the said MARY JOYCE DROPE against her will; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

[Caption Omitted in Printing]

MOTION FOR CONTINUANCE

Comes now the Defendant, JAMES E. DROPE, and states to the court that he has had a psychiatric examination made by Dr. Joseph F. Shuman, M. D., a copy of which report is attached hereto.

Defendant moves the court to continue his case until September, 1969 in order that he might receive an Examination, Evaluation and psychiatric treatment, as suggested by Dr. Shuman, at the Malcomb Bliss Hospital in the City of St. Louis, Missouri.

/s/ Lester Watson
Attorney for Defendant
1212 Big Bend Blvd.
Richmond Heights, Mo. 63117
647-6330

JOSEPH S. SHUMAN, M. D.
ANTON F. HEUSLER, M. D.
NEUROPSYCHIATRY
326 Northland Medical Bldg.
St. Louis, Mo. 63136

Telephone CO 1-9310

February 22, 1969

Lester Watson, Esq.
Attorney at Law
1212 Big Bend Boulevard
Richmond Heights, Missouri
63117

Re: James E. Drope

Dear Mr. Watson:

Pursuant to your request I performed a psychiatric evaluation on Mr. James E. Drope in my office on February 20th, 1969. Mr. Drope had been driven to my office by his wife. This was a healthy looking, well built, well developed white male, who appeared to be markedly agitated. The patient at times would wring his hands. He had difficulty in talking because of his marked anxiety.

Mr. Drope explained that one day he came home from the union hall, after not having gotten any work and he started drinking; apparently, he spent the day drinking. He said that he got home at 3:30 p.m. and went to sleep. His wife woke him at 6:00 p.m. and sent him to the store, but after buying his groceries he also went to the tavern for a few drinks and also got himself a six-pack. He said that he started drinking and then was joined by a few men aged twenty to twenty-two. They, apparently, drank with him until about 2:30 a.m. He said they had been talking about going over to East St. Louis and finding some girls. Mr. Drope then claimed that the next part of the history is really a blank to him. He repeats what he has been told, but claims that he has absolutely no memory for it. He says that all he remembers is that he was bringing the groceries upstairs when he saw some police come into the street and

up around his house and they arrested him after his wife screamed to them to watch out for him because he was carrying a gun. Mr. Drope said that he doesn't remember anything, but he was told that he and the four men with him went to his home and raped and threatened his wife with a gun and a knife and that this occured between 2:30 and 4:00 a.m.

Mr. Drope said that he was taken to the hospital and was examined and then he was taken to the jail and eventually to the City Workhouse. He said that there were several warrants against him. After being in the workhouse for one or two weeks he was let out on bond. He said that he has been trying to work since then. He also said that his wife wants to drop the charges, but that he is due back in court on February 26th. He said that he and his wife are now getting along okay.

PAST HISTORY: Mr. Drope was born in Gideon, Missouri, on April 29th, 1937, the second of five children. The youngest three were the product of a different father. Mr. Drope said that he has seen his father only four times in his life. Apparently, his father was divorced by his mother when Mr. Drope was still only a baby. A stepfather raised him, but he died in 1952. The mother has since remarried several times and is now with her fourth husband.

Mr. Drope said that he was shunted back and forth to many cities and schools and he finally quit school in the fourth grade when he was fifteen or sixteen years old. This occured after his stepfather died and he had to go to work. He was living in St. Louis at the time. He had numerous jobs such as being a newspaper boy, a delivery boy, a packer, etc.

Mr. Drope first married at the age of seventeen and was divorced at the age of twenty-three. He and his wife had four children; they are now with his ex-mother-in-law in Arkansas. His ex-wife has also remarried. These children run in age from fifteen to eleven. The patient said he has seen them only once in the past two years.

In 1958, when the patient was twenty-one, he was living in St. Louis and, because of the need for money and because he was not working, he took part in a burglary, but he was caught. He served thirty-six months in the penitentiary in Jefferson City. While he was there his wife divorced him. At this point the patient pointed out that he has very much trouble remembering these things. He said that it seems like it was only a week ago. He remarried after his release from the penitentiary, but he is unable to remember the date. He has since had five children and he says they range in age from five or six to six months. Patient has had numerous jobs. In the last few months he has been working out of the union hiring hall for truckers. He said that he made a living and that he also did odd jobs to supplement his other pay. He admits that he is greatly in debt and just cannot catch up.

PAST MEDICAL HISTORY: The past medical history reveals the usual childhood diseases, but there have been no operations, although the patient has apparently been injured many times. Once, as a child, he fractured a leg and due to this he was discharged from the service. He said that he enlisted at the age of seventeen, but was discharged only a month later because of that bad leg. Mr. Drope has also one other arrest and that was for car theft. He did not serve any time because he was placed on parole immediately. That was over ten years ago.

Mr. Drope said that he smokes three or four packs of cigarettes a day. He said that he drinks only when he is upset and that he does drink to the point of getting drunk.

In talking further with Mr. Drope, in response to a question about hearing voices, he thinks that he heard voices after his stepfather died and he also described hearing voices only last January and that he saw a vision of his stepfather and grandmother and, apparently, had a conversation with them. The patient admits that he had been drinking at that time also.

Mr. Drope was markedly agitated and upset. He is not a very good historian and he claims much difficulty with memory. He appeared to be cooperative in this examination, but he had difficulty in participating well. As a matter of fact, before he left my office I gave him a sedative to get him calmed down. I also gave him some samples of medication together with a prescription for these medications in the hope that he can get himself relaxed so he can carry on more efficiently. The patient had a difficult time relating. He was markedly circumstantial and irrelevant in his speech. He showed marked anxiety and there was no sign of any depression or apathy at this time. His affect seemed to be harmonious with his thought content. There was no sign as to the presence of any delusions, illusions, hallucinations, obsessions. ideas of reference, compulsions or phobias at this time.

In a simple IQ exam Mr. Drope was able to achieve a score in the low normal range, but on further tests for knowledge of current news events and famous names and places, he did very poorly. Mr. Drope was well oriented in all spheres. With much difficulty he was able to explain a few abstractions. He also showed some difficulty in explaining some differences. He was able, without trouble, to answer questions testing judgement. He had much difficulty even doing the simple counting and calculations problems.

After finishing with Mr. Drope I then talked alone with his wife. She is twenty-four years old and says that she has been married for seven years and has five children. She admits that she has left him several times in the marriage, but came back because of having no money. Often she would leave him because of his sexual perversions. She admits that in the past he has inserted a bottle in her vagina and he has also had rectal intercourse. She said that he had once mentioned that he might do something like bringing up some men to take care of her so that he had actually had it in the back of his mind before. She also said that he is very suspicious and is always accusing her of running around. Appar-

ently, his first wife ran around. Mrs. Drope admits that her husband drinks much, but she doesn't remember him being real drunk more than three times since they were married. She also describes what she feels is strange behavior on his part in order to get sympathy. This would include even falling down flights of stairs to gain sympathy from her. Mr. Drope would stay away two or three days at a time if he got mad at her, otherwise, they got along very well. She thinks that he has been always as nervous as he is now and that he would not hold a job very long because of his nervousness.

IMPRESSION: If it can be said that some people are born with a silver spoon in their mouth then it must be admitted that Mr. Drope was born with a fish hook in his. He has always led a marginal existence. He received practically no education and no training for any worthwhile occupation. Having had several fathers is certainly not condusive to proper father identification. Apparently, abnormal sexual acts are part of Mr. Drope's own culture. He has a history of occasional drinking, although he seems to drink more often than his wife suggests. He also has a history of anti-social conduct. At the present time Mr. Drope is certainly markedly agitated and upset. He finds himself in very much trouble and is confused about the whole thing. I do not find any strong signs of psychosis at this time. This individual certainly needs the aid of a psychiatrist, but I would really not be very optimistic about success about a man like him because I doubt that he would keep up with any kind of psychiatric care, since this requires some modicum of sophistication.

This is a very neurotic individual who is also depressed and perhaps he is depressed for most of the time. Apparently, he certainly has much reason for this. As for the diagnosi I want to offer: (1) Sociopathic personality disorder, sexual perversion. (2) Borderline mental deficiency. (3) Chronic Anxiety reaction with depression.

The prognosis for Mr. Drope must remain guarded. Perhaps his anxiety can be controlled with medication, but one cannot expect much change in his personality defect. Trusting that this is the desired information, I am,

Very truly yours,

/s/ J. S. Shuman, M.D.
JOSEPH S. SHUMAN, M.D.

JSS/meg

IN THE CIRCUIT COURT
CITY OF ST. LOUIS

Cause No. 405-R

May 27, 1969

STATE OF MISSOURI
vs.
JAMES E. DROPE

Charge: Rape

Comes now the State of Missouri and does not oppose the motion for a psychiatric examination of the Defendant James E. Drope in the above entitled cause.

Respectfully submitted,

/s/ John J. Morton
Assistant Circuit Attorney

[Filed May 27, 1969, James H. McAteer, Clerk, Circuit Court for Criminal Causes]

[7] TRANSCRIPT OF TRIAL

Thereupon, on said 23rd day of June, 1969, the trial of the above-entitled cause began in Division No. 19 of said court, before the Honorable David A. McMullan, Judge, presiding in said Division. Mr. Michael Frank, Assistant Circuit Attorney, appeared as attorney for the State of Missouri. The defendant, James Edward Drope, appeared in person in open court. A panel of prospective jurors was then summoned into open court. Thereafter, upon the arrival of Mr. Lester Watson, attorney and counsel for the defendant, in open court, the jury panel was sworn in on voir dire, after which the following proceedings were had in said cause:

MR. WATSON: Your Honor, please, I would like to make a record in this case. Do you want the jury in here while we make it?

THE COURT: You can make your record out of the hearing of the jury.

(The following proceedings were had out of the hearing of the prospective jurors:)

MR. WATSON: Where is the court file? Let the record show that on May 27th, 1969, this case was set for trial, at which time the attorney for the defendant Drope filed a motion for a psychiatric examination, and requesting that the case be continued until the September Term of court. It was determined at that time—the motion filed requested the continuance [8] for the reason that the defendant had been previously examined by a psychiatrist who had recommended further examination, evaluation and psychiatric treatment of the defendant, at which time the Court informed the defendant's attorney that the case would be continued to September, and the defendant—

THE COURT: Well, pardon me. Just a minute. Just a minute, Mr. Watson. This case was assigned here this morning. It was on this morning's docket. You came in, and I have been waiting all day, and it is now four o'clock. And we have been in touch with your office;

we have been in touch with your home and every place else, and then you came in here about twenty minutes ago, a little after 3:30, and you wanted a continuance and the State objected. And I said that continuances were passed upon in Division No. 16, and had already been passed on. I think you were over there to Judge Walsh to make your request and record for continuance. Now you are stating things that Judge Walsh advised you to the contrary. I talked to Judge Walsh over the telephone, and he did not say, and he told me he did not say, that this case would go over to September. And in addition, Judge Walsh told me the motion wasn't in proper form, and he pointed out that it was not in proper form. And I may be mistaken, and I thought that the situation was that you were to file a motion.

MR. WASTON: That is correct.

THE COURT: And you did not do so.

[9] MR. WATSON: As I understood it,—

THE COURT: Pardon me. You in this record started out that a motion was filed.

MR. WATSON: Well, here the file shows a psychiatric—

THE COURT: That is the Clerk's minute. Look at the motion.

MR. WATSON: I am looking at the motion.

THE COURT: Is it in proper form?

MR. WATSON: No, it is not.

THE COURT: Then no motion has been filed.

MR. WATSON: Never overruled or sustained or anything else, but it was filed.

THE COURT: Did you and Judge Walsh agree—

MR. WATSON: I was to file an additional motion?

THE COURT: No, no. Not in proper form?

MR. WATSON: Mr. Morton and I agreed. I don't know that the Judge did. And I was to file an additional form.

THE COURT: Pardon me. I don't mind you making a record but I want the record to be honest.

MR. WATSON: I do too. I don't want it any other way. That is absolutely the way I want it, Judge.

Now, I don't know how far I got before the Court made a statement into the record, but, in any event, counsel for the defendant having filed this motion asking that the case be set in September, and having agreed to file an additional motion [10] that would comply with the statutes, did not prepare this case for trial and did not know it was on the docket until informed by Judge Douglas Jones in Clayton that Judge McMullan has called and asking if I were in his courtroom, and that I was wanted in the Circuit Court in St. Louis.

I have not had the opportunity as yet to file this motion under the statute, asking that the man be sent to Malcolm Bliss Hospital for a further psychiatric—

THE COURT: Just a minute. Pardon me. It appears to me now that your motion is such that a record ought to be made before Judge Walsh.

MR. WATSON: If Your Honor wants us to go over there.

THE COURT: Now, going back and forth over there, I am in this sort of position: Judge Walsh told me that that motion was filed and it was an improper motion, not in proper form, and you suggested, and it was suggested that if you seriously contend that he needed physicatric help, that you would file a proper psychiatric motion. It was not filed. It was docketed. Now, Judge Casey Walsh did not tell me that he sustained the motion that it would be set in September. That is contrary to what Casey Walsh told me. Did Judge Walsh state in September?

MR. WATSON: At the time I and Mr. Morton discussed it.

THE COURT: Not until September?

[11] MR. WATSON: Until September.

THE COURT: And assured you of that?

MR. WATSON: Yes, Judge. May I explain one thing more because he said it took such a long period of time to get a person through Malcolm Bliss, there was a waiting period and it could be done during the summer months and be ready for trial or else the examination would eliminate trial by September.

THE COURT: Did he say he would set it in September?

MR. WATSON: Did he say he would set it in September?

THE COURT: Yes.

MR. WATSON: Judge, I don't know. There was such confusion because the thing was just sort of left off and set later on in the day when I wasn't there, as Mr. Morton said it was set by him and the Clerk of the court when they were resetting all the cases that had gone over from that particular week.

THE COURT: Well, may the record show this: There is nothing in this record,—and the word of Casey Walsh himself, there is nothing in the record to show it was to be set in September, and Judge Walsh did not tell me it was to be set in September and did not assure you it was set in September. The file shows that a minute was entered on May 29th that it was continued to June 23rd. Now, what may have happened is, if you were going to file a motion for a psychiatric examination, it would have the result of it having to go over to September to [12] give time for the examination to be made. Judge Walsh may have said that but there is nothing in the record. And I don't believe that Judge Walsh stated it would be set in September. You just came back from Judge Walsh's division. I am sure if Judge Walsh made that statement to you, he would honor it. And I can only go by the file and Judge Walsh.

And let the record show they went back to Judge Walsh's division, and after being in there fifteen or twenty minutes, Judge Walsh has refused to grant a continuance.

MR. WATSON: That's right. He said the case was assigned over here and the jury waiting all day, and the witnesses were here, and for that reason he didn't feel he wanted to grant a continuance.

THE COURT: It seems strange to me that you would come into the court and before this Judge and start quoting what Judge Walsh said.

MR. WATSON: Because I didn't get an opportunity to question him.

THE COURT: Pardon me. We'll go ahead with the case now. And this jury has been waiting practically all day. We will at least get started. And before the jury is sworn in, I am going to ask Judge Walsh to review this statement. All right.

MR. WATSON: Let me state further into the record, I am objecting to going to trial with this defendant also for the [13] reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial.

THE COURT: All right. The record—

MR. WATSON: Furthermore, for the record, I am going to object at this time for the reason that the State on June 19th, 1969, added five additional witnesses whom we have had no opportunity to examine, and claim surprise for that reason.

Secondly, I am going to object to going to trial at this time for the reason that a memorandum, dated May 27th, 1969, headed "State of Missouri v. James E. Drope. Charge: Rape: Cause No. 405-R. Comes now the State of Missouri and does not oppose the motion for a psychiatric examination of the defendant James E. Drope in the above-entitled cause. Respectfully submitted, John Morton, Assistant Circuit Attorney",—which certainly bears out what I said, that we had agreed to have a psychiatric examination, Your Honor, before he went to trial. That is the second memorandum.

THE COURT: Well, it will be overruled. These matters have already been passed on before Judge Walsh. And let me say with reference to this endorsement of the witnesses, the Court has been assured by the Assistant Circuit Attorney that those were mailed to your office on the morning of June 19th, this memorandum was. And your objection in claiming surprise now should have been another reason urged on Judge Walsh in the [14] Assignment Division. The case has been sent out to trial, and your objection has no merit.

MR. WATSON: Let the record show that I had no opportunity to make such objection before Judge Walsh

as the case was assigned out of the Assignment Division before I ever arrived there. I didn't know it was on the docket.

THE COURT: Well, the dockets are published. And let the record further show—

MR. WATSON: The dockets are published but I had no reason to believe that this case would be on the docket or to look for it specially. My secretary didn't find it. She runs the docket in the cases and tries to be ready for everything.

THE COURT: Your client was interrogated and he stated that you would meet him down here this morning.

MR. WATSON: Judge,—

THE COURT: Let's proceed.

MR. WATSON: —I don't know what he said. Of course, I wasn't here, but I had matters in the Circuit Court in St. Louis County this morning. And that is where I went, and I could not possibly be in the Circuit Court in St. Louis. I was involved in matters in the Circuit Court of St. Louis County this morning, but what my client said I don't know.

THE COURT: I called Judge Douglas Jones.

MR. WATSON: He said you called him; he told me. I was still in his division. I had another matter on at 1:00 [15] o'clock.

THE COURT: Pardon me. Judge Jones stated to me this morning that he just got through calling the docket, that you were not assigned out, that you did not have anything in his court preventing you from coming down.

MR. WATSON: Judge, he didn't know that I did have something on his docket at 1:00 o'clock, and it was 11:30, this was. I didn't leave that room until 11:30,—

THE COURT: This is—

MR. WATSON: —and I went to Judge Bardgett's room on a divorce matter.

THE COURT: Regardless. All right. Let's proceed.

MR. WATSON: May I also put into the record that all this colloquy that we have been going through has

taken place in the presence of the jury. And I feel in looking at it it is going to work to the detriment of the defendant. I don't think it is fair. I have asked—

THE COURT: The trouble, Mr. Watson, with a lot of these things, they are all an afterthought. You said you wanted to make a record. You did not say that you wanted to make it out of the presence of the jury. The record may show the jury is in the courtroom, and this was done at the Bench. And I am sure they haven't heard one word that was said prior.

MR. WATSON: I asked the Court prior to the objection if you wanted to—

* * * *

[23] STATE'S CASE IN CHIEF:

MARIANNE JOYCE DROPE, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name.
A My name is Marianne Joyce Drope.
Q Marianne, what was your marital status on January 17th, 1969?
A I was living with my husband.
Q What is his name?
A James Edward Drope.
Q Is that the man sitting over there (pointing)?
A Yes, sir.
Q Did you have any children as a result of that marriage?
A Yes, sir; I have five children.
Q What are their names and ages?
A August Lee Drope, James Edward Drope, Anita Marie Drope, Pete Allen Drope, and Patricia Ann Drope.
Q How old is Pete?
A Six.
Q The oldest is six. And the youngest?
A She is nine months.
Q When were you married to James Drope.
A I have been married to him seven years. It was December the 24th,—
Q When was that, the 24th?
A The 24th.
Q You were—How old are you now?
A Twenty-four.
Q You were seventeen at that time?
A Yes.
Q Had you graduated from high school at that time?
[24] A No, sir, just grade school.
Q Did you finish the 10th grade?
A No, sir.

Q After leaving school, how old were you at that time?

A Sixteen, I believe, or a little over.

Q At that time when you left school, what did you do, mam?

A I worked for my mother and my parents.

Q How long after leaving school did you marry Jim?

A Almost a year.

Q Again, you were seventeen. Turning to January 17th, 1969, which was a Friday, did your husband James Drope have a job?

A Sir?

Q Did your husband have a job on January 17th?

A No, sir, he was unemployed.

Q What did he do when he was employed?

A He worked for the—as a union truck driver.

Q Do you remember how much he had worked that January?

A No. I would say not more than a week within that month.

MR. WATSON: If your Honor please, I want to make an objection to any further testimony on behalf of this witness for the reason she and the defendant are husband and wife.

THE COURT: Be overruled.

Q (Mr. Frank) When was the last time before January 17th he worked consistently?

A Before then? It had been over two months. I couldn't say.

[25] Q Will you tell us where you were living on January 16th or 17th?

A 3438 St. Vincent.

Q Is that in the City of St. Louis?

A Yes, sir.

Q Marianne, will you describe for us first the type of building you were living in?

A It was a 2-family, brick flat, and I lived on the 2nd floor.

Q And, Marianne, will you tell us about this apartment on the 2nd floor we are interested in?

A Two bedrooms, living room and kitchen.

MR. FRANK: Does the Court wish to see the pictures?

THE COURT: Well, when you have them marked.

(Thereupon, the reporter marked two photographs depicting living quarters, for identification as State's Exhibits 1 and 2, respectively.)

Q (Mr. Frank) Marianne, I show you that which has been marked State's Exhibit No. 1. Will you look at that, please? Can you identify that picture?

A Yes, sir.

Q What is that a picture of, Marianne?

A The front entrance of the house where I lived at 3438 St. Vincent.

Q Marianne, does that picture fairly and accurately depict the front of your house as it was on the 16th and 17th?

A Yes, sir.

Q Marianne, I will show you State's Exhibit 2. Can you identify that picture?

A Yes, sir.

Q What is that a picture of, Marianne?

A It is the stairway to the front door going upstairs where I did live.

[26] Q Does that picture fairly and accurately depict the steps going up to your apartment as it existed on the 16th and 17th of January of this year?

A Yes, sir.

MR. FRANK: Your Honor, at this time I would like to offer into evidence—

MR. WATSON: We have no objection.

MR. FRANK: —State's Exhibits 1 and 2, and ask permission to pass these to the jury.

THE COURT: Very well.

(Thereupon, said exhibits were handed to the jury.)

Q (Mr. Frank) Marianne, on January 16th, which was a Thursday, on that night did your husband leave home at any time?

A Yes, sir, he left at 8:30 that evening.

Q And where was he going when he left home at 8:30 that evening?

A He said he was going to the store for groceries and for milk for my baby.

Q And what did you do, mam, when he left?

A I watched television until about 11:00 and I fell asleep.

Q When you fell asleep, was he home then?

A No, sir.

Q What was the next time you woke up, Marianne?

A At 1:00 o'clock to feed my baby.

Q That would be 1:00 A.M. on the 17th?

A Yes, sir.

Q And did you feed your baby?

A Yes, sir.

[27] Q And what happened then?

A Well, I just laid down and hadn't quite fell asleep, and I looked at the clock, and it was about 1:30. And I heard somebody at the door, and the key was turning.

Q What did you say?

A I said the key was turning in the door, and I heard somebody open the door to come in.

Q After you heard the key turn in the door, did the door open?

A Yes, sir.

Q And then did you hear anything?

A I heard my husband come in the steps because he said, "Don't be afraid, it is just me coming in."

Q It was his voice?

A Yes, sir.

Q Marianne, when you heard that key in the door and heard him say, "It's is me", were any lights on in your apartment at that time?

A When he came up the steps, the landing, the bathroom is off to the left, and he went in the bathroom and turned the light on and went through the hallway from there to the kitchen. And he went to the bathroom. So when he turned the bathroom light on, the bathroom light was on then. It wasn't on before.

Q Marianne, what did he do in the kitchen, did you see or hear?

A He opened the back door. I heard him open the back door.

Q What happened at that time?

A There was quite a bit of noise at once, and a bunch of guys coming running in [28] all at once with my husband.

Q Marianne, I want to stop you. You said a bunch came running in. Will you tell us, did any men come from the front door?

A Two from the front, two from the back.

Q The kitchen door you are talking about?

A Yes, sir.

Q Is that five, counting your husband?

A Yes, sir.

Q What happened when they came running in?

A They were there before I had enough time even to get up out of bed.

Q What happened then when they came running in?

A They forced me down on the bed and my husband said, "Done move, don't scream or I'll blow your brains out."

Q When you say they forced you down on the bed, what do you mean, one or two or—?

A They all did.

Q Did each of the men grab an arm or a leg?

A Yes. And they proceeded to tie me up.

Q Marianne, you just said your hsuband said what to you?

A He said to me not to scream or make any noise or he would blow my brains out.

Q What was he going to blow your brains out with?

A He had his gun with him.

Q Did you see this gun?

A Yes.

Q Marianne, could you see these men?

A Yes, sir.

Q I asked you a few minutes ago, Marianne, if there were [29] any lights on in your apartment before your

husband came in, and your answer was "No". How can you tell the Court and jury that you could see these men, you could see the gun?

A The bathroom light was on. And where my bed is there is a window light there, and my baby had torn the shade enough, we could see the light from the outside on the bed. With the bathroom and that light shining in the same direction, I could not miss seeing them.

Q Marianne, your husband had the gun. What happened then?

A Well, they tied me up first to the bed.

Q Who tied you up?

A Mike Barylski, and the others were holding me down.

Q Did your husband help?

A My husband helped, yes, sir.

Q He tied your hands or legs, or what part of your body did he tie?

MR. WATSON: Your Honor, I will object to that as being leading and suggestive.

THE COURT: It will be sustained.

Q (Mr. Frank) Marianne, what part of your body did your husband tie?

A My hands and my legs to the bed posts.

Q While he was doing that, Marianne, who had the gun?

A My husband, which he gave the gun to Raymond Tuttle at that time.

Q After tying you to the bed, what happened, Marianne? [30] Did your husband stay in the room?

A Yes, sir.

Q Was there any other weapon other than the gun, Marianne, that Tuttle now was holding?

A My husband then went into the kitchen and got a butcher knife.

Q In your kitchen?

A Yes, sir.

Q What did he do with the butcher knife?

A He held it to my throat.

(At this point the reporter marked a nightgown for identification as State's Exhibit 3.)

Q Marianne, I will show you what has been marked as State's Exhibit 3. Can you identify that?

A Yes, sir. That is my nightgown.

Q That is the nightgown you had on that night?

A Yes, sir.

(At this point the reporter marked a third photograph for identification as State's Exhibit 4.)

MR. WATSON: I am going to object to that exhibit for the reason that that picture is apparently—the date on the back of it shows it was not taken until June of 1969.

(The following proceedings were had out of the hearing of the jury:)

MR. WATSON: And it is quite evident that the picture shows that, that this whole matter was set up by someone else and was not the original condition of the room on the 17th day of January, 1969.

[31] MR. FRANK: Now, Your Honor, we will have witnesses to testify as to when that picture was taken. That picture was printed on the date on the back.

THE COURT: Overruled at this time, the Court reserving any further objections along that line, but it may be identified.

(The following proceedings were had within the hearing of the jury:)

Q (Mr. Frank) Now, Marianne, I show you State's exhibit No. 4. Will you tell the Court and jury what that is a picture of?

A It is a picture of the bed where I was tied up, and the rope, and shows exactly where it was and where my son helped me get loose from it.

Q Marianne, looking at that picture, does that picture show the window you were talking about a moment ago?

A Yes, sir.

Q Does it show the tear in the shade that you were talking about a moment ago?

A Yes, sir.

Q Where is that tear?

A It is right alongside of the bed (pointing on exhibit) where the window is.

Q Level with the head on the bed?

A Yes, sir.

MR. FRANK: Your Honor, at this time I would like to enter into evidence State's Exhibit No. 4.

MR. WATSON: Objection, Your Honor, we have made in [32] the record before, until such time as the proper foundation is laid. And also no date has been set as to the time the picture was taken if what Counsel say is right.

MR. FRANK: Your Honor, I might be able to assist Counsel.

Q Marianne, were you present when the photographer was taking pictures around your place with the officers?

A No.

Q You weren't there at that time.

MR. FRANK: Your Honor,—

THE COURT: Well, if you state in the record you will prove it.

MR. FRANK: Your Honor, the State will put on a police officer who will testify that he was present when this picture was taken.

THE COURT: When?

MR. FRANK: That will be the next witness, unless you want me to put him on right now.

THE COURT: When was that picture taken?

MR. FRANK: That morning, January 17th, the day it happened.

THE COURT: All right. It will be overruled.

MR. FRANK: All right. At this time may it be accepted into evidence?

THE COURT: It will be admitted into evidence.

[33] MR. FRANK: At this time I will pass it to the jury, Your Honor.

Q Marianne, did you see the other men that were in the room with your husband?

A Yes, sir.

Q Who were they?

A Roger Butler, Rayborn Tuttle, Mike Barylski and another kid I don't know.

Q You say "kid". Are you talking—how old a person?

A Sixteen.

Q Do you know this Butler, Tuttle and Barylski?

A They used to work on cars with my husband and see him with them.

Q Marianne, how were your hands tied to this bed?

A Well, tied to the bed posts (indicating).

Q You mean straight back, Marianne?

A Yes.

Q They weren't tied together?

A No, back (indicating).

Q Marianne, how about your legs, how were they tied to the bed post?

A Spread.

Q Were they tied the same way, spread out?

A Spread out.

Q All right. Marianne, after you were tied to bed in this manner, will you tell us what happened at that time?

A They took turns raping me, first Roger Butler.

Q Marianne, while Roger Butler was having intercourse with you, was anybody else on you at the same time?

[34] A No, but there was somebody over me.

Q Somebody over you. Over your head?

A Yes, sir.

Q Who was over your head?

(At this point the witness placed her hand on her face and began crying.)

MR. FRANK: May we have a moment, Your Honor?

THE COURT: All right. Counsel, you may. Pardon me, it would be better, I think.

MR. FRANK: All right.

Q Marianne,—

A Mike Barylski was over me.

Q Mike Barylski. What was Mike doing over you?

(At this point the witness shook her head and sobbed and wiped her nose.)

THE COURT: Madam, pardon me, you are going to have to do the best you can. If you need a recess, if you have to have a recess,—

THE WITNESS: No, I will—

THE COURT: —tell the Court. All right.

Q (Mr. Frank) Marianne, what was Mike Barylski doing?

A He put his privates in my mouth.

Q Put his male organ in your mouth, Marianne?

A Yes, sir.

MR. WATSON: Just a minute. I am going to object to Counsel commenting and leading the witness. I think the witness—

[35] THE WITNESS: (Intervening) He put his privates in my mouth.

Q (Mr. Frank) Marianne, do you know about how long Mike was on top of you?

A No, sir. They took turns. I couldn't see the clock and see the time exactly, no.

Q Did Mike have a discharge while he was on top of you?

MR. WATSON: I believe—I am going to object to that for the reason we are not responsible for that. The defendant is only charged with rape.

THE WITNESS: (Interjecting) And sodomy.

MR. WATSON: He is merely charged with rape.

THE COURT: Well, the objection will be sustained as to that particular thing.

Q (Mr. Frank) You say Roger was having intercourse with you at that time?

A Yes, sir.

Q Did Roger have a discharge at the time he was on you?

MR. WATSON: Your Honor, I make the same objection. This defendant here stands charged with rape, not what Roger Butler did.

THE COURT: Overruled.

Q (Mr. Frank) Marianne, I will ask you again. Do you know if Roger Butler had a discharge while he was on top of you?

MR. WATSON: Just a minute. Your Honor, I am going to object to that as leading and suggestive.

THE COURT: Well, she can tell what happened. The [36] objection will be sustained as to it being leading.

Q (Mr. Frank) Marianne, will you tell us what happened while Roger Butler was on top of you?

A He had intercourse with me. Whether he had a discharge, I could not tell you, I could not swear to that.

Q Marianne, when Roger got off, what happened then?

A Mike Barylski, and Roger Butler at the top.

Q Which position?

A Ah, switched position.

Q Did Mike then have intercourse with you?

MR. WATSON: I object to that, Your Honor. It would be leading and suggestive.

THE COURT: Counsel, the objection is sustained.

Q (Mr. Frank) What happened when Mike got on top of you?

A Mike Barylski had intercourse with me while Butler was on top.

Q Will you tell what happened while Mike was on you?

A All the time this was happening, Raborn Tuttle had his gun at my head, at the same time my husband had the knife at my throat. And they told me if I said anything or screamed, he would blow my brains out, or kill my kids.

Q Who told you that?

A Raborn Tuttle.

Q When Mike got off you, what happened then?

A Then there was this kid next. And then my husband was at the top. They switched places.

Q Did you know this kid?
A I know him from seeing [37] him, yes.
Q Do you know his name?
A I can't tell you his name, no.
Q All right. After this teen-ager and your husband were on you, what happened then?
A Then my husband had relations with me in the rectum.

MR. WATSON: Your Honor, I am going to object to that; husband wife, Your Honor.

THE COURT: Well, I think in this particular case, the objection is overruled, although we can take care of that on argument. All right.

Q (Mr. Frank) What happened then after your husband?

A Then there was Tuttle—Raborn Tuttle just alone. He had intercourse with me.

Q Who held the gun at the time?

MR. WATSON: Your Honor, please, I am going to object.

THE COURT: Pardon me. It will be sustained.

Q (Mr. Frank) Tell us what happened when Tuttle was on you?

A Roger Butler held the gun.

Q Marianne, could you tell us whether or not you could tell if any of these men were drinking?

A They smelt of it. I couldn't say they were.

Q Marianne, what were you thinking, what was your state of mind when these acts were committed upon you?

MR. WATSON: Your Honor, I object to that for the [38] reason that it invades the province of the court and jury and it calls for speculation and conjecture.

THE COURT: Overruled.

MR. FRANK: Your Honor,—

THE COURT: It is overruled. You may proceed.

Q (Mr. Frank) Marianne, what was your state of mind? What were you thinking when these acts were being committed upon your person?

MR. WATSON: I object further, Your Honor, for the reason the question is too general, not specific as to time and act.

THE COURT: You better come up here just a minute.

(The following proceedings were had out of the hearing of the jury:)

THE COURT: What else do you have from the State?

MR. FRANK: I have a case citation it is proper on a rape case; I have the citation, Supreme Court, 1964, case.

THE COURT: What do you expect the answer to be?

MR. FRANK: The answer that would be elicited, that she kept her eyes open at all times so that she would not forget anything that happened.

MR. WATSON: That wasn't the question. "What were you thinking?" Whether her eyes were open—

THE COURT: Just a minute. You need not argue it any further. I want to know what your answer is? What is your [39] citation?

MR. FRANK: 380 S.W. 362.

THE COURT: All right. The objection is overruled.

(The following proceedings were had within the hearing of the jury:)

THE COURT: You may answer the question. Do you remember the question?

A Yes, sir. He asked what I was thinking about at the time. Well, the only thing I could do was keep my eyes open and keep track of everything that was going on, which I could see everything that was going on at the time because I had been through this with my husband before, and I know how he acts, similar.

(At this point the reporter marked strands of a clothes line for identification as State's Exhibit 5.)

Q (Mr. Frank) Marianne, I show you that which has been marked State's Exhibit No. 5. Will you look at that, Marianne. Can you identify that, Marianne, for the Court and jury?

A This is the clothesline they tied me up with.
Q Did you have that type of line in your house at the time, Marianne?
A No, sir.
Q This was not in your house at the time?
A No, sir.
MR. FRANK: At this time, Your Honor, I ask that State's Exhibit 5 be entered into evidence.
[40] THE COURT: Well,—
MR. WATSON: Before it is entered, may I ask a few questions on voir dire?
THE COURT: Very well.

VOIR DIRE EXAMINATION

BY MR. WATSON:

Q May I have that. Mrs. Drope, you identify this as being a clothesline or something that you were supposed to have been tied up with. Do you have any marking on there by which you can identify it?
A Do I have any marking?
Q That's right.
A No, sir.
Q In other words, you are not sure whether this is the same clothesline, as we will call it, as was used or not, are you?
A I think so.
MR. FRANK: May the record show that the next police officer will testify—
THE COURT: Pardon me. The exhibit will be kept out until the next police officer testifies.
MR. FRANK: All right.

(At this point the reporter marked a revolver for identification as State's Exhibit 6.)

DIRECT EXAMINATION (Cont'd)

BY MR. FRANK:

Q Marianne, I show you State's Exhibit 6. Will you look at that and will you tell the jury what that is?

A This is the gun that was used on me at the time I was raped.

[41] Q Do you know whose gun that is?

A Yes, sir. My husband's—James Drope.

Q Have you seen that gun before that particular night?

A Yes, sir; many times.

Q Marianne, can you tell the Court and jury how long these acts took place upon your person?

A It was about 1:30 because I just looked at the clock when he, my husband, opened the door, and I believe it was about 3:30, maybe quarter to four when the police got there. And they had just got there within thirty minutes—I wouldn't say; ten minutes at the very most.

Q The police got there within ten minutes?

A Yes, sir.

Q And the police got there about 3:45 or the latest was about 3:55?

A Yes, sir.

Q Marianne, when they left, did your husband leave with them?

A Yes, sir.

Q When they left, what position were you left in?

A I was tied to the bed posts, and, as I said before, with my arms and legs stretched. They had put a towel and a scarf around my mouth to gag me, with the cotton in my mouth first. They left me tied, and they covered me up with a sheet.

MR. FRANK: I'll get my evidence in.

(The reporter then marked an envelope allegedly containing cotton, for identification as State's Exhibit 7.)

[42] (The reporter then marked a towel, for identification as State's Exhibit 8.)

(The reporter then marked a scarf, for identification as State's Exhibit 9.)

Q Marianne, I show you that which is marked State's Exhibit 7. Will you tell the Court and jury what that is?

A What it is? It is tissue paper.

THE COURT: What was the answer?

A It was tissue paper they had stuck in my mouth before the rape.

Q (Mr. Frank) I will show you now that which has been marked State's Exhibit No. 8. Can you tell us what that is, please?

A A towel.

Q What was the towel—how did they use it?

A They put the scarf around the neck and tied the towel around the mouth after they put tissue paper in my mouth.

Q What went over your mouth directly, the towel or the scarf?

A The towel and then the scarf.

Q I will show you that which has been marked as State's Exhibit 9. Can you identify that?

A Yes.

Q What is that, Marianne?

A It is the scarf that was over my mouth, and the towel.

Q All right. Did they just lay it over your mouth?

A No, it was tied in the back with a knot.

Q The towel and then the scarf? The scarf went on top [43] of the towel over your mouth?

A I am trying—just a minute.

MR. WATSON: Well, Your Honor, I object. That is repetition. Counsel went over that before. The witness has already answered.

THE COURT: Overruled.

Q (Mr. Frank) Will you answer directly which went on top, which was tied?

A The scarf, and then the towel.

Q Did your husband or any of the other men say anything to you, Marianne, when they left?

A Yes, sir. They say if I ever said anything about this what had happened, they would be back and kill my kids.

MR. WATSON: Your Honor please, I am going to move that this be stricken. It doesn't differentiate between certain people that were supposed to have been there. Counsel had two questions in one.

THE COURT: Well, pardon me. He can separate them.

Q (Mr. Frank) Marianne, did your husband personally say anything?

MR. WATSON: I object to that as leading and suggestive, Your Honor. Counsel can certainly ask who it was.

THE COURT: Who said anything, and what.

Q (Mr. Frank) Who said anything, and what?

A I believe Bob Butler and Raborn Tuttle, both. And with this my husband said, "This isn't the first time this is going to hap- [44] pen", right after.

MR. WATSON: They said, "This is the first time?"

A They said they would be back; this wasn't the first time it was going to happen.

MR. WATSON: Who said that? Tuttle?

A My husband.

MR. WATSON: He said it?

A Yes, sir.

MR. WATSON: All right.

Q (Mr. Frank) Marianne, how did you get free from the bed?

A My little girl, 3, and my boy, 6, apparently couldn't sleep, awake, but as soon as they left, they got up and came to the room where I was. And my little girl was scared. So she went back and told my oldest boy named August to come in there. I heard her. They came in there and seen me and went right to the kitchen and got a knife and untied me, cut the rope.

Q What did you do then?

A I proceeded to go downstairs as soon as I could make it down the steps and asked the lady downstairs to call the police for me please, and she did.

Q How soon after the phone call did the police arrive?

A I'll say not more than ten minutes at the very most. I couldn't say exactly but within minutes though.

Q Did your husband return that morning?

A He was just coming in as they came. As soon as they got there he started in the door, came back.

[45] Q What happened at that time, Marianne?

A One was at the bottom of the steps and the other one was at the top, talking. And when he started to talk, I said, "Please not let him in. He had a gun and he just threatened me a while ago, and not let him in."

Q Was your husband present during the time all these acts were committed upon you?

A Yes, he was standing right over me. He was telling them what to do.

MR. WATSON: I move that be stricken as not responsive. A voluntary statement on the part of the witness.

THE COURT: The statement, "He stood right over me", may stand. The balance—

MR. WATSON: The jury instructed to disregard it.

THE COURT: —the jury is instructed to disregard. Members of the jury, during the trial, when the Court sustains an objection, the jury automatically disregards that.

MR. FRANK: Your Honor, at this time the State introduces Exhibits 7, 8, and 9 into evidence.

THE COURT: Very well.

MR. WATSON: May I see the cotton? This is the envelope. Is this cotton that was taken?

MR. FRANK: Do you have any objection?

MR. WATSON: No, we have no objection.

MR. FRANK: May it be entered?

THE COURT: Very well.

[46] Q (Mr. Frank) Marianne, after your husband was arrested, what happened then?

A They took me to the—the police officers took me to City Hospital for an examination.

Q Marianne, did you have any physical injuries to your person?

A I had a very bad infection.

Q Did you have any marks on your body?

A I had marks, yes, on my face and my neck.

Q What hospital? City Hospital "1"?

A Yes, sir, "1".

Q After the hospital, what happened, Marianne?

A I went to the police station and gave a report on what had happened. I went to the Warrant Office from there.

Q The Warrant Office in the Circuit Attorney's Office?

A Yes.

Q Marianne, on the day of the 17th, some time in the afternoon, were you present when your husband was questioned by the police?

A Yes, sir.

Q Were you present when he was advised of his constitutional rights by the police?

A Yes, sir.

Q Did he make any statement to the police in your presence?

A Yes, sir.

Q Marianne, what did he tell the police in your presence?

A Just what he said?

Q That's right.

A Just what he said or what the whole—?

[47] Whatever he said, that is the question.

A He said—he admitted that he did it, and he said did it as a joke. He said it was all just a joke.

Q Did he go into detail and tell the police what had happened?

A He said he was with Raborn Tuttle, Roger Butler and Mike Barylske, and came up to my house with the intention to rape me.

Q Marianne, since this incident have you and your husband lived together as man and wife?

A We have a very short time, yes, sir.

Q How long after this incident did you live together as man and wife?

A Three to four months.

Q Where were you living at that time?

A Well, we lived downstairs from my mother's house, 7918 South Broadway.

Q Will you tell us why you went back to live with him?

A Because—

MR. WATSON: If your Honor please,—I'll withdraw the objection.

THE COURT: All right.

A Because he was trying to make me—make out he wasn't well. The boy was telling that he was going to a psychiatrist, it was best to go with him, and went with him with my other friend to see if there was any hope left because of my children. And when he went to the psychiatrist and I talked to him, he says it would be best if we would try to get along together, [48] that he thought he would be all right. But he said he would go on and go to work, try to take care of the children. That is what I wanted,—my children taken care of.

Q (Mr. Frank) Marianne, do you have your children now at this time?

A No, sir.

Q Where are they?

A I don't know.

Q When was the last time you saw your children?

A Tuesday morning.

Q Do you know who has your children?

A No, sir.

Q Does your husband or anyone on his side of the family have them?

MR. WATSON: Your Honor, I object to that as being leading and suggestive.

THE COURT: Well, she said she didn't know. Be sustained.

Q (Mr. Frank) What have you done, Marianne, trying to find your children?

A I went to the police. They suggested that I talk to the Circuit—

MR. WATSON: I can't hear you.

A I went to the police station to search, and they suggested that I speak to the Circuit Attorney to see what they thought I could do about it. And I went to the relief lady again.

Q (Mr. Frank) Marianne, on Tuesday when you last saw your children, where were they?

A 7918 South Broadway, [49] at my house.

Q Were they with anyone at that time?
A They were with my stepfather.
MR. FRANK: I have no further questions at this time, Your Honor.
THE COURT: All right. I think now would be a good time to take a short recess. And, members of the jury, keep in mind the admonition the Court has given you. The court will be in recess.

(Court in temporary recess)

CROSS-EXAMINATION

BY MR. WATSON:

Q Mrs. Drope, when were you and your husband married?
A We were married in December.
Q The year, please? What year?
A Wait just a minute.
Q Beg pardon?
A Just one minute.
Q I am sorry. I thought you said in '33?
A No. December 25th, 1960, I believe,—'61.
Q You were married on Christmas day, on Christmas Day in '60 or '61?
A The 16th. I am sorry.
Q I am sorry. I understood you to say the 25th. Now, Mrs. Drope, in 19—how long—You and your husband went to live together after you were married in '60 or '61? Was it '60 or '61?
A '61, I believe.
Q '61. Now, tell me, after you were married. were you and your husband divorced?
A After we were married, no, [50] sir.
Q Have you ever been divorced from James Drope?
A No, sir.
Q You never have. And then you continued, I assume, to live with him as his wife from '61 until 1968; is that right, or '69?
A Off and on.
Q Off and on. You had separations during that period of time?

A Yes, I did.

Q And then you would go back together again, is that correct?

A Yes, sir.

Q Now, when you had these separations, what was the cause of the separation?

A He would not work part of the time and take off, not work, would not support the children. I had no other choice.

Q But to leave him, is that right?

A I had to have somebody to help me, yes.

Q And where did you go?

A He left.

Q Pardon me, when you left, where did you live then?

A Where did I live then?

Q Yes.

A Well, I stayed at my Mother's part of the time. I did the best I could.

Q Now, I understood you then during this period of time off and on was the period he would not work; is that correct?

A Yes, sir.

Q And, Mrs. Drope, you did live, with the exception of [51] these separations, for these nine years together as husband and wife?

A As husband and wife, yes.

Q That is correct? Is that right?

A Yes.

Q And he did work quite a bit of the time, did he not?

A To nail it down right now, I couldn't say; maybe half and half, maybe a little more.

Q Now, Mrs. Drope, didn't he lose jobs because of his nervous condition, do you know?

A Not to my knowledge.

Q Not to your knowledge?

A No, sir.

Q But when he worked, he always contributed to the support of you and the children, is that right?

A No, sir.

Q Pardon?

A No, sir.

Q He did not?
A No, sir.
Q What would he do with his money, if you know?
A I don't know.
Q Mrs. Drope, since this thing happened you have lived together I think you said for three months, approximately,—
A Approximately.
Q —as husband and wife?
A Yes, sir.
Q And during that period of time he has contributed to the support of you and the children, has he not?
A Part of the time.
Q Part of the time?
A Yes, sir.
[52] Q Which part now? I mean by that, is that the time when you were separated that he didn't support you?
A Never when we were separated.
Q What?
A Never when we were separated.
Q Never when you were separated. Mrs. Drope, you talked with the Circuit Attorney about this case, have you not?
A Talked to him about it?
Q Yes, sir.
A I read the statement.
Q You read the statement?
A Yes.
Q Whose statement?
A My husband's statement, the boys'.
Q You read all those statements?
A Yes, sir.
Q Where did you read those?
A At his office.
Q In the Circuit Attorney's Office?
A Yes.
Q And when did that happen?
A Hmm, that was, I believe, about a month ago or somewhere.
Q About a month ago?

A I think so.

Q All right. Now, then, did you talk to anybody from the Circuit Attorney's Office since that time?

A None other than coming here.

Q Beg pardon?

A None other than the other day when I was here.

Q That was Monday?

A Yes, sir.

Q Pardon?

A Yes, sir.

Q And how did you get here that day?

A I came in a [53] car.

Q You came in a car?

A Yes, sir.

Q Your car?

A No, sir.

Q Whose car was it?

A A man that I know, her husband.

Q Some people brought you here?

A Yes, sir.

Q Now, Mrs. Drope, right after this happened, back on the 12th day of February, 1969, you came to my office, did you not, with your husband?

A Yes, sir.

Q And we discussed this matter?

A Yes, sir.

Q And at that time didn't you tell me that you felt your husband was sick and needed psychiatric care?

A Yes, sir.

Q And, Mrs. Drope, after this discussion you did not want to prosecute your husband, did you?

A No, sir, I did not, and after talking to you I said I would not.

Q And you signed, Mrs. Drope,—I'll hand you here—

MR. WATSON: Will you mark this please as the defendant's exhibit.

(The reporter then marked a statement for identification as Defendant's Exhibit "A".)

MR. FRANK: May I see that, please?

MR. WATSON: Sure (handing exhibit to Mr. Frank).

THE WITNESS: You want me to answer that question completely?

THE COURT: There is no question pending now, madam.

[54] Q (Mr. Watson) Mrs. Drope, I am going to hand you the Defendant's Exhibit "A", and ask you if that is your signature?

A Yes, it is.

Q And you signed that, did you not?

A I certainly did.

Q On the 12th day of February, 1969?

A Yes, sir.

Q And at that time, Mrs. Drope, you didn't want to prosecute your husband, did you? You felt he was a mental case, is that right?

A You told me you would make an appointment for him to see a psychiatrist, you thought it would be best for me to go with him, and this is what I done.

Q Yes.

A At that time I agreed with you, yes.

Q That's right. And you and your husband went to see Doctor Shuman, a psychiatrist; isn't that correct?

A Yes, sir.

Q And he examined your husband, and he also spoke to you quite a bit, did he not?

A Yes, sir.

Q And you felt, did you not, Mrs. Drope, after that that your husband was a mental case?

A He told me that he had some problems, the doctor did.

Q The doctor told you that?

A That he needed to see somebody to talk to. Insofar as what was wrong with him he could not tell me, that he thought it would be better if I were with him.

Q If you were with him?

A Right.

[55] Q That is, live with him; is that what he meant?

A What he meant I don't know exactly. He said I would be better with him, what he told me.

Q Mrs. Drope, when you talked to the doctor, did you tell him that the cause of the separations that you had were caused because you would often leave him because of his sexual perversion?

A Did I tell the doctor that?

Q Yes.

A I cannot say for sure. I probably did because he asked me about it, and I told him exactly. He asked me and I told him.

Q And you also described to him, Mrs. Drope, some very unusual acts, sexual acts on behalf of your husband, is that right?

A That's right.

Q All right. That is the situation. And, Mrs. Drope, do you recall that at one time while you and your husband were together that he blacked out and rolled down a pair of stairs—stairway, rather; do you recall telling the doctor about that?

A I never told anybody he blacked out. I seen him roll down steps, yes.

Q Beg pardon?

A Yes, sir, I seen him roll down steps, yes, sir.

Q Do you know what was the cause of that, why he rolled down the steps?

A The only thing I can tell you is what they told him many times at City Hospital, that is something he does upon hisself.

[56] Q Something he does upon himself?

A Yes, sir.

Q Let me ask you—Did I interrupt you?

A Go ahead.

Q May I ask a question?

A Yes.

Q All right. When these scenes occurred, the usual thing you described to Doctor Shuman, would that be the result of some dispute or argument between you and your husband or would he just go into one of these things and fall down the steps?

A Usually when he doesn't get his way or is worried about something. He doesn't say anything about it. I

can't say exactly. It is more what he would say. I don't know the reason.

Q Well, Mrs. Drope, during the period of your married life and up till now your husband has always been very nervous, has he not?

A At times.

Q You mean varying at different times?

A Not as nervous since he has been, since this incident, no.

Q Tell me, when did you go back to live with him, Mrs. Drope, after the 17th day of January of this year?

A I believe it was the last part of April, somewheres around in that, I don't know exactly.

Q When you came to my office with him, you were not living together as husband and wife at that time?

A No, sir.

Q You were separated?

A Yes, sir.

[57] Q But then you went back and lived together about three months, sometime in April? And then you wouldn't be up until now. April and May. Would it be before May, would it, excluding March?

A Be around the 1st of April, I couldn't say. It is so mixed up.

Q All right. Well, Mrs. Drope, if I recall your testimony, you said the doctor said that Mr. Drope needed treatment, is that right?

A He said he had some troubles, but he should go up there and talk to them at Malcolm Bliss, but Jim would not go.

Q Do you know whether or not he has visited Malcolm Bliss, of your own knowledge?

A Of my own knowledge?

Q Yes, mam.

A Ah, he told me he had been.

Q He told you he had been. He had been going to Malcolm Bliss?

A I think he went there once. I don't know about any other time.

Q At least one time you know of it?

A Yes, he told me.

Q Yes. Now, Mrs. Drope, I don't like to go into these things. Some things are necessary. This exhibit, State's Exhibit 4, the picture of the bedroom with the bed and the rope lying around on the floor, would you look that that, please?

A Yes, sir.

Q Now, was the bed in that position the night that this was supposed to have happened—

A Yes.

[58] Q —or did happen, supposedly? It was sitting right in the room in that manner; it wasn't over in the corner anymore?

A No, sir.

Q It was just like that, is that right?

A Right.

Q And now I believe you named—May I have it (referring to the exhibit). You named four men. Was your head at the top of the bed?

A Yes, sir.

Q And the back of the top of the bed was against the wall and right near that shade with the hole in it; is that right?

A Yes, sir.

Q Now, you have described here to the jury on direct examination that one man was having sexual intercourse with you, and one man was, I think you said, over your head. Now, if he was over your head, I presume his feet would have to be up against the top of that bed, is that right?

A (Witness shaking head).

Q That is not right?

A No.

Q Well, in what position?

A Standing.

Q Oh, he was standing?

A Yes, leaning over.

Q Over the side of the bed?

A Uh-huh.

Q Oh, I see. And the other man was supposed to be having intercourse with you at the same time?

A Yes.

Q Did you, Mrs. Drope, scream or holler or try to seek help?

A Would you scream and holler with a gun at [59] your head and a knife at your throat?

Q Probably I wouldn't but I am asking you if you did?

A No, sir.

Q You didn't make any outcry?

A No, sir.

Q Didn't attempt to rouse your children?

A My children were plenty aroused.

Q But they didn't come to your help?

A I guess not.

(Witness starts to cry again)

Q Still after all this happened, Mrs. Drope, on the 12th of February you didn't want to prosecute your husband, and you thought he was a mentally sick man and thought he needed help, is that right?

A I thought if there was a last possibility. I had five children which I loved very much. If he was sick, I would try everything I could, yes.

Q Weren't you convinced that he was sick after talking to Doctor Shuman?

A No, sir.

Q You were not convinced. What is more convincing—

MR. FRANK: Your Honor, I am going to object to this line of questioning.

A He did not tell him—

MR. FRANK: Just a minute. Will you approach the Bench, please.

(The following proceedings were had out of the hearing of the jury:)

MR. FRANK: Judge, he has not raised any defense of [60] insanity under the mental health statute. We

talked about this. He is going into it directly from the back door. He is trying to get in from the back door what he can't get in from the front door.

MR. WATSON: That may be a good way of describing it, but I think this witness, and his wife, living with him for nine years, certainly can express her opinion, being the prosecuting witness, as to his condition.

THE COURT: As to his health, but regardless of that now, the record may show this has been brought, and Mr. Watson has stated that he hasn't pled insanity.

MR. WATSON: That is right.

THE COURT: But he is setting it up—wait a minute. He is setting it up as a condition as a whole. He also brought in falling down these steps.

MR. WATSON: That is right.

THE COURT: That he would be incapable of doing these things; if he was doing it physically, it would be an unusual situation, due to his physical, general nervous condition and not insanity in the sense.

MR. WATSON: Not as set forth in the statute.

THE COURT: Well, now, that is the very thing that you would eliminate.

MR. WATSON: I say not as set forth in the statute.

THE COURT: Well, I'll let him go into it. The door [61] has been opened. All right.

(The following proceedings were had within the hearing of the jury:)

Q (Mr. Watson) Mrs. Drope, I believe you told Counsel for the State that you don't know where your children are?

A No, sir.

Q Mrs. Drope, didn't you leave your children with your stepfather?

A They were with my stepfather, yes.

Q And you left them there with him, did you not?

A Yes, sir.

Q And did you ever find out from him what he did with the children?

A As far as I know, my husband came in.

Q As far as you know, your husband came to your stepfather. Do you know that your stepfather turned the children over to your husband?

A Yes.

Q I am asking if you know that. Do you know that?

A Yes.

Q Now, Mrs. Drope, can you tell me please what caused you to change your mind after the 12th of February, when you signed this affidavit, and made your determination that you wanted to go ahead and prosecute your husband?

A Because my husband tried to choke me, tried to kill me.

Q When was this?:

A Sunday night.

Q This past Sunday night?

A Yes, sir.

Q I see. That is when you made up your mind that you [62] wanted to prosecute him,—

A Yes, sir.

Q —is that right? And where did that occur?

A In my home.

Q On South Broadway?

A Yes, sir.

Q 79—what is it?

A 7918.

Q 7918 South Broadway?

A Yes, sir.

Q Mrs. Drope, had you called up your husband and asked him to come to see you at your home on Sunday night?

A No, sir.

Q You did not?

A No, sir. I would never do that.

Q Beg pardon?

A I would never do that.

Q And you never did that, of course?

A That's right.

Q Did you have a discussion with him on the telephone about some money that he had mailed to you for the support of the children and you said you didn't get it?

A Yes, sir.

Q And you asked him to bring that money and give it to you?

A He said he left the message with my mother. That is why he called. He said he would be there in the morning and bring the money down, which was twenty dollars.

Q And did he come there with the money?

A Yes, sir.

Q Now, was that the time he was supposed to have choked you?

A Sometime that next morning, 1:00 o'clock, sometime in the morning. He kept me up all night.

[63] Q Was this Monday morning you are talking about?

A Sunday night.

Q When was it when you talked to him on the phone? Was that Sunday morning?

A It was Sunday after—evening.

Q Pardon?

A It was Sunday evening when he called and said he would be by in the morning, and he came by.

Q He was by Sunday night?

A He said he would be by Monday morning.

Q Was there any specific time or set a time?

A No, sir.

Q You expected him then, I presume, about eight or nine o'clock on Monday morning?

A Yes, sir.

Q And did you have the children with you there then?

A Yes, sir.

Q And when was it that you turned the children over to your stepfather?

A It was that Monday.

Q The same Monday?

A After he had choked me.

Q What?

A After he had choked me.

Q He came there Monday morning and choked you?

A He came there Sunday night after he had called and said he wouldn't be there till morning. He came—

Q He came Sunday night?

A Yes.

Q Did he give you the money Sunday night or did he return on Monday morning?

A He gave me the money and he stayed there; he didn't return.

[64] Q did you ask him to stay?

A No, sir.

Q Did you tell him to get out, you didn't want him?

A Yes, sir.

Q And he didn't do it?

A No, sir.

Q Did you call the police?

A Yes, sir.

Q That night you called the police?

A Uh-huh.

Q To take him out? Did they come there that night?

A Yes, sir.

Q Did the police refuse to?

A They came there and he turned it around.

Q They came there and he turned it around. What do you mean by that?

A He said he just wanted to talk to me, and that is the way they left us. Dispute between—

Q That there was a dispute between you and your husband?

A Yes.

Q And had you told the police that he had choked you that night?

A He didn't do it then. It was after.

Q It was after that that he did?

A Yes, sir.

Q Tell me, where did you go then on Monday when you turned the children over to your stepfather?

A I went to a friend's house, a woman I know.

Q And how long did you remain there?

A Remained there for two days until I found a place.

Q You found a place to live?

A Yes, sir.

Q You moved away then from your mother's home; is that [65] correct?

A For the time being.

Q And you are living at that place now, are you, and have been since a week ago Tuesday or Wednesday?
A Yes.
Q A week ago today, is that right?
A Yes, sir.
MR. WATSON: I believe you may inquire. That is all, Your Honor. Pardon me. Just a minute, please.
Q (Mr. Watson) Mrs. Drope, could it have been Saturday night instead of Sunday night that Mr. Drope came there with the money for the children?
A No, sir.
Q It was Sunday night. You didn't see him at all on Saturday?
A Yes, he came by.
Q He was there on Saturday night?
A Yes, sir.
Q Did he give you money that time?
A No.
Q He did not. He didn't stay there Saturday night?
A Overnight, no.
Q He then returned on Sunday night, is that correct?
A Yes, sir.
Q Did you have a discussion about money Saturday night or Sunday?
A I believe Saturday night he said he would try to see that I had some money.
Q And then he brought some money there on Monday morning?
A Sunday night.
Q Sunday night. And he remained there then, and that was the time that the police were called?
A When he was [66] choking me.
Q And he said it was a family quarrel and things of that nature, and you didn't take any action, is that right?
A Yes, sir.
Q And he remained there the rest of that night until the next morning?
A He sure did. I was up all night.
Q You were up all night?
A Yes, sir.
Q Was he up all night?

A Yes, sir. He kept me up.
Q He kept you up?
A Yes, sir.
Q Well, then, did he leave on Monday morning or did you leave?
A He left on Monday morning. He said he was going to work.
Q And you left after that?
A Yes, sir.
Q And you turned the children over to your father-in-law or stepfather?
A Yes, sir. He was there when I left.
Q Did you tell him that you were going to get a baby formula for the children when you left?
A My stepfather knew exactly why I was leaving. Everybody knows.
Q Is that what you told him, you were leaving to get a formula for the baby?
A Yes, sir.
Q And you didn't return after that, did you?
A No, sir,—
MR. WATSON: That is all.
A —but my stepfather knew.
[67] MR. WATSON: Yes.

REDIRECT EXAMINATION

BY MR. FRANK:

Q Marianne, that Defendant's Exhibit "A", will you read that out loud, Marianne?
A (Reading) "Marianne Drope states that I do not desire to prosecute my husband James Drope on the charge of sodomy of which I complained to the police of the City of St. Louis on the date of January 17th, 1969. My reason for not proceeding with this prosecution is that I believe my husband is suffering from a mental condition. We have five small children. I further believe if my husband receives treatment for his mental condition from a psychiatrist, that he will be much better off than having been prosecuted for this offense."

Q Marianne, did he ever get any treatment for this condition after the initial visit to the psychiatrist?

A I could not tell you. As far as I know, no.

Q Marianne, the charge on this paper is sodomy. That is not what we are proceeding on. This is a charge of rape that we are proceeding on, isn't that right?

A Yes, sir.

Q Marianne, you stated that you talked with the Circuit Attorney about a month ago. What circuit attorney did you talk to a month ago? That was me, wasn't it?

A Yes, sir.

Q Where did you talke to me?

A In your office.

Q Is that upstairs or downstairs?

A Upstairs, I [68] believe.

Q Is that the Warrant Office we talked in?

A Yes.

Q Why were you at the Warrant Office?

MR. WATSON: Well, Your Honor please, I must object to that for the reason it is quite apparent that what the Circuit Attorney is asking, whatever she was at the Warrant Office for would be immaterial to any issue in this case.

MR. FRANK: Your Honor, it happens to be a part of this case, another defendant in this case, another one of the men.

MR. WATSON: Well, Your Honor, we are only trying this case. We are not trying any other case.

MR. FRANK: He asked about—

THE COURT: Pardon me. Just a minute. You better both step up here.

(The following proceedings were had out of the hearing of the jury:)

THE COURT: What is the probative value?

MR. FRANK: He raised the question seeing the woman thirty days ago. I saw the woman thirty days ago to swear out a warrant against the other man in the inquiry. That is all I want the jury to know; not even working on her husband's case at the time.

MR. WATSON: I can't see the—

THE COURT: Pardon me. I don't see the materiality [69] of this.

MR. FRANK: He raised the question.

THE COURT: What question?

MR. FRANK: He raised the question that I saw her thirty days ago.

THE COURT: Is there anything wrong with that?

MR. WATSON: I don't think there is.

THE COURT: You can argue it. It is your duty to interview witnesses before you put them on.

MR. FRANK: I wasn't interviewing her as a witness.

THE COURT: It makes no difference. You had a right to interview her. Let's proceed.

MR. FRANK: All right. Thank you.

(The following proceedings were had within the hearing of the jury:)

Q (Mr. Frank) Marianne, when you signed this document, whose office were you at?

A Mr. Lester Watson's.

Q You were at Mr. Watson's office?

A Yes.

Q Who was there at the office when you signed this copy?

A My husband and his secretary.

Q Nobody else with you?

A No.

Q Marianne, in the seven years you were married to James Drope, did he ever at any time have a blackout?

A Not to my knowledge.

Q During the seven years of marriage did he ever complain [70] of head problems that would cause a blackout?

A No more than bad headaches.

Q Did he ever say that he had blackouts?

A No, he never told me that.

Q During the seven years of marriage did you ever see him have a blackout?

A No.

MR. FRANK: No further questions.

RECROSS-EXAMINATION

BY MR. WATSON:

Q Marianne, when he fell down the steps, did he have a blackout?

A Not when he got right up, no.

Q You mean when he got down to the bottom of the steps? How many steps were there?

A Which one? I don't know which one he is referring to. It happened more than once.

Q Apparently from your answer it happened more than once, is that correct?

A Yes, sir.

Q Now, at different locations?

A Yes, sir.

Q Where did the first one happen that you can recall?

A Before I was married to him.

Q That would be some nine, ten years ago, is that right?

A Yes, sir.

Q And where was that, if you remember?

A It was at an apartment place where I used to live; I can't remember.

Q At an apartment where you used to live?

A Yes.

Q Can you recall how many steps were on that sairway?

A I can't remember exactly, no.

[71] Q Could you give us an estimate? Would you say as many as ten, or was it a long, high stairway or short?

A No, it was short.

Q Short. Approximately ten, would you say?

A Eight or ten, maybe.

Q Eight to ten. And he rolled down those steps, is that correct?

A Yes.

Q That is before you were married,—

A Yes, sir.

Q —nine or ten years ago? Now, how often has it occurred since that time?

A Maybe two or three times at the most.

Q Maybe two or three times at the most. When these things happened, was he drunk or just fall over and fall down the steps?

A Just when he didn't get his way,—

Q Pardon?

A Just when he didn't get his way, he would be a little nervous, and this would go on.

Q A little nervous and roll down the steps?

A Yes.

Q I believe you said—

MR. FRANK: Just a minute. I am going to object to that statement. Unless he wants to make a closing statement, I think it is improper.

THE COURT: All right. Overruled. Proceed.

Q (Mr. Watson) Mrs. Drope, when you came in the office to talk to me, and your husband introduced you, I was there, [72] and I think you said my secretary was there in the office; is that correct?

A Yes, sir.

Q And at that time we discussed this matter that occurred supposedly on the 17th day of January; is that right?

A Did we discuss it?

Q We discussed it, the three of us; you say you and your husband and I discussed it?

A You asked what happened.

Q And you told me?

A Yes.

Q So we discussed it?

A O.K.

Q Now, you were referring when you were in my office—you came there to talk to me, and you were referring to what occurred on the 17th of January, 1969, is that right?

A Yes, sir.

Q Whether it was sodomy, rape or anything?

A Both.

Q You were still talking about what happened on the 17th of January, is that right?

A Yes, sir.

Q Nobody threatened you, did they, in my office?

A No, sir.

MR. WATSON: I think that is all.

FURTHER REDIRECT EXAMINATION

BY MR. FRANK:

Q Marianne, before your husband took one of these falls—you said in about seven years of marriage you saw them three times. Before he took these falls, did he black out before he fell?

A No, sir.

Q After he fell, was he blacked out or in a state of [73] blackout?

A I am no doctor, but if he can get right up, I don't think he was out.

Q Marianne, when he got right up, did he remember falling down the steps?

A I never—as far as I know, I don't remember.

Q Did you talk to him about it?

MR. WATSON: I believe, Your Honor, the witness answered the question. Anything further along that line is argumentative.

THE COURT: What did she say?

MR. WATSON: She said she didn't know.

THE COURT: That was on the previous question. Overruled.

Q (Mr. Frank) Marianne, did you talk with him about the fall down the steps?

MR. WATSON: May we define when it was that this conversation is supposedly to have taken place?

THE COURT: He said any time.

A Before we were married, the first time it happened, I asked him. He was all right as soon as he got up. Of course, I was afraid. So I asked him. I said, "Do you want me to get some help?" He got right up and said he was all right. So, because he couldn't be that much

wrong when he got right up and started walking around and said he was all right.

Q (Mr. Frank) Marianne, does your husband do a lot of [74] drinking?

A Well, I believe he does. I can't say for sure. Maybe quite a bit since we have been separated. Like I said, we were separated quite a bit.

Q That particular night, January 17th, was he one of the ones that smelled of liquor?

A Yes, sir.

MR. FRANK: I have no further questions.

MR. WATSON: No further questions, Your Honor.

THE COURT: All right. You may step aside. Call your next one.

MR. FRANK: Call Ruth McKnight.

MR. WATSON: Your Honor, please, we are going to object to any testimony from this witness because she was not endorsed by the State until the 19th of June. We didn't receive notice of it until Saturday. We have had no opportunity to take her deposition or know what her connection is in any manner with this.

MR. FRANK: Is he trying to make a speech or trying—

THE COURT: Pardon me. Just a minute. He has a right to make his objection, Mr. Frank.

MR. WATSON: I therefore, if your Honor please, object to any testimony on behalf of this witness.

THE COURT: All right. Be overruled.

* * * *

[93] (Thereupon, on Tuesday, June 24, the further hearing of the above-entitled cause was laid over to the following day, Wednesday, June 25th, 1969, at 9:30 A.M.)

(Thereafter, on Wednesday morning, June 25th, 1969, the jury and counsel for the respective parties again appeared in open court. The defendant, James E. Drope, did not appear in person in open court at this time or any other time during the progress of the trial of the above-entitled cause. The follow-
[94] ing proceedings were then had in said cause, in the absence of the defendant:)

THE COURT: Good morning, members of the jury. We were delayed through no fault of either the Court or the attorneys in this case. I just want to let you know that. * * *. You may proceed.

MR. WATSON: Your Honor, at this time I am going to move for a mistrial in view of the fact that the defendant, I am informed, shot himself this morning.

MR. FRANK: Wait—

MR. WATSON: I am addressing the Court.

THE COURT: Wait.

MR. WATSON: The defendant, I understand, shot himself this morning. He is in the City Hospital being operated on.

THE COURT: Just a minute. The Court already decided that the matter would proceed for trial.

MR. WATSON: Your Honor, it makes it awful difficult for me to go to trial without the client.

THE COURT: That is the difficulty, Mr. Watson, that your client brought about, not you, not the Court. He was on bond and his responsibility to be here. So the Court will proceed with the case.

MR. WATSON: My motion then is overruled, Your Honor?

THE COURT: Yes.

* * * *

[128] (The following proceedings were had out of the hearing of the jury:)

THE COURT: The State rests?

MR. FRANK: At this time, Your Honor, the State concludes its case and the State rests its case at this time. We ask that the exhibits presented, "13", "14", "15" and "16" be admitted into evidence.

THE COURT: All right. They will be admitted into evidence except those portions of the hospital records to which the Court sustained an objection.

MR. WATSON: Your Honor, I want to present this to [129] you.

"MOTION FOR VERDICT OF ACQUITTAL"

"The Court instructs the jury at the close of the State's case that the State of Missouri has failed to produce sufficient testimony to sustain the allegations in the Indictment that the defendant unlawfully, feloniously and forcibly did rape, ravish and carnally know the prosecuting witness against her will in that the Prosecuting witness and the Defendant are husband and wife.

"The Defendant not being charged with aiding and abetting in the rape of Mary Joyce Drope.

"The Court should have declared a mistrial when Defendant moved for same, when it became apparent that the Defendant shot himself and could not further attend the trial as he is confined as a Patient in the City Hospital of St. Louis No. 1, therefore depriving him of being confronted by his accusers as he is being tried in absentia.

"Therefore, Defendant requests the Court for a Verdict of Acquittal."

Filed June 25, 1969.

THE COURT: All right. Let the record show that the defendant filed a motion for a verdict of acquittal, and also again renews in effect his motion,—

MR. WATSON: That's right, Your Honor.

THE COURT: —and both of which will be overruled.

[130] MR. WATSON: And then there will be nothing further, Your Honor.

(The following proceedings were had within the hearing of the jury:)

THE COURT: All right. That is the State's case, Mr. Watson.

MR. WATSON: Your Honor, I have no evidence to produce at this time under the circumstances. So I must rest.

* * * *

[138] "The Court instructs the jury that any verdict that you render, before it can be received as a verdict, must be unanimous; that is, it must be agreed to by every juror, it is not the verdict of the jury unless it

is the verdict of each juror as an individual, as well as of the jury as a whole."

VERDICT OF THE JURY

(After the summation of the case to the jury by counsel for the respective parties, the Court submitted said cause to the jury for their deliberation and verdict. The jury then retired to the jury room. Thereafter, on the same day, the said 25th day of June, 1969, the jury returned into open court the following verdict:)

THE COURT: Members of the jury, have you arrived at a verdict?

JURORS (in union): Yes.

THE COURT: And the foreman—who is the foreman?

MR. ZAVADIL: Mr. Zavadil.

THE COURT: You have the verdict and forms of verdict?

MR. ZAVADIL: Yes.

THE COURT: All right. Hand them to the Sheriff.

(Thereupon, the verdict was relayed to the Court for its examination and inspection)

THE COURT: All right.

THE CLERK: Will the jury please rise and hear their verdict. (Reading the verdict)

[139] "VERDICT"

"Circuit Court of the City of St. Louis, No. 19. June 25, 1969

STATE OF MISSOURI	)	On Indictment
v.	)	for Rape
JAMES EDWARD DROPE	)	(Forcible)

"We, the jury in the above-entitled cause, find the defendant guilty of Rape.

"/s/ John Zavadil
Foreman."

THE COURT: Members of the jury, is that your unanimous verdict?

THE JURORS (in unison): Yes.

THE COURT: Is there any dissent at all from the verdict?

JURORS: No.

THE COURT: Do you wish the jury polled?

MR. WATSON: Yes, if your Honor please.

(Thereupon, the jury was polled, and upon the Clerk asking each juror, "Is the verdict I have just read your verdict?", each and every juror responded in the affirmative.)

THE COURT: Very well. The verdict will be received, and the judgment of the court will be reserved on the motion for a new trial. The Court will set the punishment, and will not do so at this time. However, the bond is canceled, and the Sheriff is ordered to take custody of the defendant as a [140] prisoner of the Sheriff. And the jury will be discharged, with the thanks of the Court for your patience. * * *.

TIME TO FILE MOTION FOR NEW TRIAL ENLARGED.

MINUTE ENTRY—June 25, 1969:

"Defendant's bond set at $25,000. Defendant granted thirty days additional time to August 4, 1969, to file motion for a new trial. Leave granted. Court sets date as July 14, 1969, for fixing of penalty."

PENALTY FIXED.

Thereafter, on July 21, 1969, the following proceedings were had in said cause. Mr. Michael Frank, Assistant Circuit Attorney, appeared for the State of Missouri. Mr. James Edward Drope, the defendant, appeared in person in open court and in the presence of his attorney, Mr. Lester Watson.

THE COURT: You are James Edward Drope?

MR. DROPE: (Nodding assent).

THE COURT: Cause No. 405-R. And on June 25th the jury returned a verdict of guilty of rape. And it is incumbent upon the Court to fix the penalty in view of the fact that you have been previously convicted of a felony. And this is not a final sentence. This is merely the fixing of the penalty in the case, and the Court now fixes the penalty at life imprisonment.

MR. WATSON: Your Honor, before—very well.

[141] THE COURT: And you have, according to the file, to refresh your memory,—

MR. WATSON: Until the 4th of August?

THE COURT: —until August 4th to file a motion.

MR. WATSON: That's right, Your Honor.

MR. DROPE (The Defendant): Life?

MR. WATSON: Life.

MR. DROPE: For something I didn't do?

THE COURT: Your attorney will talk to you. You better go and talk to him.

(Thereupon, the defendant was remanded to the custody of the Sheriff.)

"MOTION FOR A NEW TRIAL"

(Caption, signature and formal parts omitted)

"Comes now Defendant herein and moves the Court to set aside the verdict of the jury finding the Defendant Guilty for the following reasons, to-wit:

"1. That the Court erred in failing to sustain Defendant's Motion for a verdict of Acquittal at the close of the State's case, as the State failed to produce sufficient evidence to sustain the Indictment, in that Defendant was not charged with aiding and abetting others in the commssion of the crime of rape and he, himself, could not be charged with raping his own wife.

[142] "2. That the Court erred in permitting the State to proceed with the prosecution of the Defendant, in absentia, as there was no evidence produced on behalf of the State to show that Defendant was absent from his

trial by reason of his own actions or that he deliberately absented himself from said trial.

"3. That the Court erred in compelling the completion of the trial in the absence of the Defendant for the reason that it deprived Defendant from being confronted by his accusers or witnesses against him and also deprived Defendant's counsel of consulting with said Defendant during the trial.

"4. The Court erred in compelling the completion of the trial in the absence of the Defendant in that it deprived the Defendant from taking the stand and offering his defense to the charge of rape and prevented the Defendant from producing witnesses to substantiate Defendant's testimony.

"5. That the Court erred in failing to declare a mistrial when the Court was advised of the Defendant's inability to be present in the courtroom during the trial, as Defendant was being operated upon in the City Hospital in the City of St. Louis.

"6. The Court erred in giving the Instruction on credibility of witnesses, as no witness's credibility was challenged and, in giving said Instruction, the Court indirectly commented upon Defendant's failure to take the witness stand.

[143] "7. That the verdict of the Jury is against the law and the evidence, in that the Court should have sustained Defendant's Motion for a mistrial when it was apparent to the Court that the Defendant could not physically be present for the completion of the testimony offered by the State and Defendant was deprived of being able to be confronted by his accusers or witnesses against him.

"8. That the Court erred in permitting the Jury to return a verdict of Guilty in the absence of the Defendant in the Courtroom because of his inability, not brought upon himself, to be there.

"9. That to proceed with the case in absentia is in violation of Rule 29.02 of the Rules of the Supreme Court of the State of Missouri which provides 'No person shall be tried upon an indictment or information for a

felony unless he be personally present during the trial'

. . . .

"10. That the Court erred in permitting the Jury to return a verdict and entered same upon the records of the Court in the absence of the Defendant when there was no testimony on behalf of the State or Defendant that such absence was willful or voluntary upon his part.

"11. That the Court erred in permitting the trial to continue in the absence of the Defendant when there was no evidence that the Defendant voluntarily absented himself from the courtroom and, as a matter of fact, he did not voluntarily absent [144] himself from the courtroom.

"12. That the verdict of the Jury is against the law under the evidence that the Defendant was absent from the courtroom during a portion of the trial and said absence was not brought on by his own acts or willingness.

"13. That the Court's sentence of life imprisonment in the Department of Corrections in the State of Missouri is inhuman, cruel, excessive and unusual punishment under the circumstances and in violation of Article VIII of the Bill of Rights of the Constitution of the United States and in violation of the Constitution of the State of Missouri.

"14. For the above reasons, the Defendant moves the Court to set aside the verdict of the Jury and to grant the Defendant a new trial."

Filed July 30, 1969.

HEARING ON MOTION FOR NEW TRIAL.

(Thereafter, on September 19, 1969, defendant's motion for a new trial came on for a hearing during which the following proceedings were had: The defendant, James Edward Drope appeared in person in open court and with this attorney, Mr. Lester Watson. At the beginning of the hearing there was no representative of the State present in open court.)

THE COURT: Mr. Watson, Mr. Frank wants to know if you are going to have any evidence in the case?

MR. WATSON: Yes, I am, Your Honor.

[145] THE COURT: He is taking a deposition, and he didn't know that there was going to be any testimony, and he is in the middle of the deposition, and a reporter there. He is asking the Court that yours be continued. He wants to know what the evidence will be so that he will be able to get witnesses in. Now, what it means—

MR. WATSON: I don't believe at this time the defendant should be compelled to disclose his evidence.

THE COURT: All right. We will hear part of it and continue it and give them an opportunity to bring in any evidence they have.

MR. WATSON: If you want to do that this morning.

THE COURT: All right. (Addressing the reporter) Mr. Utrup, this is the case of State of Missouri v. James Drope; Cause No. 405-R. Mr. Watson is here. Mr. Michael Frank, representing the State, is here, and the defendant is here.

On the record, Mr. Watson announces that he wants to produce evidence and make a record with reference to certain allegations on a motion for a new trial. The State, through Mr. Frank, has requested the Court for a continuance so that he would be able to produce evidence contrary to what he understands to be the issue with reference to any evidence. And that goes to paragraphs 2, 3, 4, 5, 7, 8, 9, 10, and 12, with reference to the defendant's absence from court. And Mr. Frank [146] has requested the Court for a continuance so he can obtain witnesses on behalf of the State that the absence is not any fault on the part of the State but due to the defendant's own fault. And the Court requested Mr. Watson what his evidence would be, and he said he wouldn't like to state in advance. So the Court suggested that we hear Mr. Watson, and if the State asks for a continuance, they will be given an opportunity to produce additional evidence.

MR. WATSON: Will you take the stand. I might state to the Court at this time that the testimony being offered by the defendant is solely and only for the purpose of clarifying the record as to his inability to be present in the courtroom at the time that the case was being tried in his absence.

JAMES EDWARD DROPE, sworn, testified:

DIRECT EXAMINATION

BY MR. WATSON:

Q Now, will you state your name, please?
A James Edward Drope.
Q Where do you live, Mr. Drope?
A Well, I was staying with my parents at the time.
Q What is their address?
A Well, it was 630 East Red Bud.
Q That is in the City of St. Louis?
A Yes, sir.
Q Now, then, at the present time you are confined in the City Jail, is that right?
A Yes, sir.
Q And you have been since you returned from the hospital [147] some time in—was that July or early August?
A I believe it was July.
Q July?
A July.
Q Now, Mr. Drope, you were present in this courtroom on the 23rd day of June, at the commencement of your trial; is that correct?
A Yes, sir.
MR. WATSON: I assume, Your Honor, that that date is right. I am not looking at the information, but I believe you have the file ther.
THE COURT: Well, the file—
MR. WATSON: The case—I mean, did the case start on the 23rd?
THE COURT: Pardon me.
MR. WATSON: Did the case start on the 23rd?
THE COURT: Will you let me make a statement. The file shows that the case was assigned to Division No. 19, and the defendant present in court, and his attorney, Lester Watson. And it goes on and later on it says, "Examination of jurors on voir dire begun on June 23rd.
MR. WATSON: Thank you.

Q So you were here and present in this courtroom when I examined the jury on the 23rd day of June, 1969; is that right?

A Yes, sir.

Q Now, then, and you were here also on the next day during the trial, were you not?

A Yes.

[148] Q Now, then, Mr. Drope, you were not present here on the 25th, is that correct?

A That's correct, sir.

Q Now, on the evening of the 24th you went home from the courtroom?

A Yes, sir.

Q And then the next morning, will you tell the Court, please, what happened on the next morning? What did you do the next morning, if anything?

A The next morning I was at my—

MR. FRANK: I can't hear you.

MR. WATSON: Speak loud so Mr. Frank can hear.

THE WITNESS: Yes. I have a cold.

A I was at my parents' house. I went over to my brother's house. I think it is 6238 Bulwer, started to get a change of clothes,—

Q All right.

A —saw my children before I came to court.

Q Were your children at your brother's house?

A Yes, sir.

Q All right. Proceed.

A My mother told me to get a change of clothes. All my clothes were down in the basement. So I went down in the basement to get my clothes. I got my clothes down and I turned the light out, and that is when I started not remembering.

Q What is the next thing you remember after that?

A Being in Homer Phillips Hospital.

[149] Q And you remember being at Homer G. Phillips Hospital, is that right?

A I asked the nurse where I was, and she told me I was at Homer G. Phillips Hospital.

Q And did you remain in the Homer G. Phillips Hospital after that or were you sent to the City Hospital on Lafayette, if you know where you were?

A The only hospital I can remember being at was the Homer G. Phillips Hospital.

Q Homer G. Phillips Hospital?

A Yes.

Q Were you operated on there on the morning of the 25th of June, 1969?

A Well, all I know is what I was told. I was told I was operated on at the City Hospital.

Q At the City Hospital?

A Yes.

Q And you don't know whether they were referring to the Homer G. Phillips or the one on Lafayette?

A That is all I know.

Q That is all you know about it. Now, Mr. Drope, did you on that day take a gun and deliberately shoot yourself that you know of?

A I don't remember a thing. It happened after I turned the light out.

Q Did you do anything to prevent you from coming into this courtroom to attend your trial?

A No, sir.

MR. WATSON: I believe that is all, Your Honor.

MR. FRANK: Your Honor, the State asks the Court to let the State reserve its cross-examination and continue it for the State to bring in witnesses.

[150] MR. WATSON: Your Honor, I am going to object at this time. I believe Counsel could complete the cross-examination now. And I would naturally object to any testimony that the State would bring in at this time that they should have brought in on the 25th of June so there would be a record and the Court would be informed as to what occurred or what their contention was. At this time in support of our motion for a new trial there is no evidence in the record whatever as to what happened to the defendant. And I believe it was the burden of the State, and that is my argument in my motion that it was their duty at that time to bring in and put into the record some evidence, so that if this matter goes

to an appellate court, the court could be informed as to why the case went on in absentia, the defendant being absent.

THE COURT: Very well.

MR. WATSON: I have no objection to him cross-examining the defendant now, and I would recommend that it be done now. I think it is only fair to the defendant that it is done now.

THE COURT: Of course, also in fairness to the State, not knowing there was going to be any testimony offered.

MR. WATSON: Well, they had a copy of the motion for a new trial.

THE COURT: That doesn't necessarily follow there is going to be any testimony. It is your position it was their [151] duty to present evidence?

MR. WATSON: Oh, absolutely.

THE COURT: If that is true, if your position is true, if a defendant disappears it is up to the State to investigate why he is not here, and it is up to the Court and the jury to wait until the State completes its investigation, and it is a locked-up jury, that means that everybody is sitting down. I don't know; it seems to me it is up to the defendant to account for his absence. He is on bond. The State couldn't follow him around. They would be severely criticized if they did. It would seem to me that the burden of proof is upon the defendant to show his absence, not the State.

MR. WATSON: Well,—

THE COURT: It seems to me, Mr. Watson, that would unnecessarily delay cases. It would have the Court and jury—

MR. WATSON: I don't think so.

THE COURT: —sit around while the State completed its investigation. All kind of complications. Let me say this; let me say this: It seems to me, if your position is correct, and I took it from the statements made, then the person—it could have been presented on a motion for a new trial, that there was no accounting

for his absence on the part of the State, therefore it could be presumed that he was not here because through no fault of his own, he was absent through [152] no fault of his own and therefore the motion should be sustained. At least, Mr. Frank, did you know that there was going to be any evidence offered?

MR. FRANK: Today? No, I had no knowledge of this at all.

THE COURT: Well, I am going to grant it. The State wouldn't even be in a position to cross-examine until they checked.

MR. WATSON: They could cross-examine on what was brought out on direct, Your Honor.

THE COURT: Didn't you have your investigator check down at City Hospital?

MR. FRANK: Yes, sir, my investigator personally went to City Hospital.

THE COURT: And got a police report?

MR. FRANK: That is correct.

MR WATSON: And saw the man in the hospital on the operating table, but that was never produced here in evidence. That should be in the record.

THE COURT: Well, the Court got a telephone call from his brother—his father-in-law.

MR. WATSON: You and I were here together. That is true, but nevertheless that is all hearsay.

THE COURT: Well, it is.

MR. WATSON: What the Supreme Court is going to be [153] interested in.

THE COURT: I think the State is entitled under this to a continuance, and also entitled to continue their cross-examination, but you will be limited to what he stated on direct.

MR. FRANK: On direct, Your Honor.

THE COURT: All right.

MR. WATSON: All right. Then I presume we won't go ahead with the motion for a new trial this morning.

THE COURT: I don't see where anything can be gained.

MR. WATSON: I have a number of cases to support my contention.

THE COURT: Do you have any other evidence?

MR. WATSON: No, Your Honor, that is all.

THE COURT: When do you want to continue it to?

MR. WATSON: I would say two weeks from today if that is convenient to the Court. I am going to be away from the 9th of October to the 29th. So it could be two weeks from today, Your Honor, or if you want to make it a week from today, whatever is convenient.

THE COURT: Pardon me. Let's declare a short recess. Let me look at my docket.

(Court in temporary recess)

* * * *

THE COURT: The matter of the motion for a new trial will be continued to October 3rd.

[154] (Thereupon, the further hearing on defendant's motion for a new trial was laid over to October 3rd, 1969. Thereafter, on October 3rd, 1969, the parties again appeared in open court, the defendant appearing in person. The further hearing then was resumed, as follows:)

THE COURT: I believe that you completed the direct examination.

MR. WATSON: Yes, Your Honor.

THE COURT: All right. (Addressing the defendant) Will you take the stand.

MR. FRANK: My the record show at our request that all witnesses be excluded from the courtroom?

THE COURT: Yes. All right.

CROSS-EXAMINATION

BY MR. FRANK:

Q For the record, please state your name?
A James Edward Drope.
Q Speak louder, Mr. Drope, so I can hear you.
A James Edward Drope.

Q I believe you testified on direct examination that you went to visit your brother on June 25th, 1969, the morning?

A My mother and I and my stepfather went over to see the kids before coming to court, and they changed clothes before coming to court.

Q Do you remember going to the garage that morning?

A No, sir.

[155] Q You don't remember going to the garage?

A No, sir.

Q All right. You testified the last time you were on the stand that the last thing you remembered entering garage and going toward the light. You are telling us now that you don't remember going to the garage?

MR. WATSON: Your Honor please, I think he is mistaken. He testified that he went to the basement as I recall it.

THE COURT: Well, he can state that he didn't say that. I can't recall.

A I didn't say anything about going to no garage.

Q (Mr. Frank) Do you remember getting yourself injured on that day?

A I remember going to the basement like I said before.

Q I said, do you remember being injured on that day, your stomach was injured in some way?

A I remember feeling something hot hitting my stomach, that is all I remember.

Q What is the next thing you remember?

A When I come to in the hospital.

Q Was that after they had operated on you?

A Yes, sir.

Q How late in the day was that?

A I really couldn't say for certain.

Q Isn't it a fact you told your mother—her name is Frankie Dewey—you were going to shoot yourself if you had to [156] come to court that day and testify?

MR. WATSON: Your Honor,—

A No, sir, I didn't.

MR. WATSON: Wait a minute. It is beyond direct examination, and as I recall, the Court informed the

State at the last hearing that he must maintain his questions within the scope of direct examination.

THE COURT: Well, pardon me. This goes to what he testified to on direct. It is contradictory.

MR. WATSON: He didn't testify that he talked to his mother—

THE COURT: Overruled.

MR. WATSON: —or anyone else, Your Honor.

MR. FRANK: Do you remember the question?

THE WITNESS: Would you mind repeating it?

MR. FRANK: Would you read the question, please.

THE REPORTER: (Reading) "Question: Isn't it a fact that you told your mother—her name is Frankie Dewey—you were going to shoot yourself if you had to come to court that day and testify?"

A No, sir, I don't recall saying anything of any sort to my mother.

Q (Mr. Frank) Isn't it a fact you told your brother Homer if you had to come to court and testify that day, you were going to shoot yourself?

[157] MR. WATSON: Same objection, your Honor.

THE COURT: Overruled.

A I said no such thing.

Q (Mr. Frank) Do you own a rifle?

A No, sir.

Q You don't own a rifle?

A No, sir.

Q You own no weapon?

A No, sir.

Q Do you know a patrolman Jerome Dampier?

A No, sir.

Q You don't know Patrolman Dampier?

A I don't recall that name.

Q Isn't it a fact you talked to Patrolman Dampier at the hospital?

A No, sir, not that I remember.

Q Do you tell the Court you did not talk to Patrolman Dampier?

A Not to my knowing, I didn't talk to anybody.

Q Isn't it a fact that you told Patrolman Dampier while you were on the operating table in the emergency

room—on the table in the receiving room that you would rather be dead than testify in the case, and that is the reason—

MR. WATSON: Now, just a minute.

MR. FRANK: Let me finish the question. This is the question.

MR. WATSON: Pardon me.

Q (Mr. Frank) —and that the reason that you shot yourself in the stomach so you would not have to testify? [158] MR. WATSON: Now, if Your Honor please, I am going to object to that again because it is beyond the scope of direct examination.

THE COURT: It will be overruled.

MR. FRANK: Will you answer the question.

A I don't even remember being in the hospital until I woke up in Homer G. Phillips.

Q It is my understanding you deny talking with the Officer?

A Yes, sir.

Q And you deny telling him that you shot yourself with that rifle?

A I don't remember talking to anyone, any officer. I don't remember talking to anyone.

MR. WATSON: Your Honor please, may I make an objection to this line of questioning at this time for the reason if the State intends to offer this testimony, it should have been offered to the Court before the case went on to be heard with the defendant in absentia. I am objecting in addition for the reason.

THE COURT: Be overruled.

Q (Mr. Frank) Didn't you keep your rifle in the basement at your brother's house with the rest of your clothes? Isn't that where you were keeping your clothes?

A May I ask what rifle?

Q I am asking you a question. Isn't that where you were keeping your clothes, in his basement?

A Yes, sir, that [159] is where I had all my clothes and my children's clothes.

Q And all your possessions, is that right?

A That is all I had down there.

Q Isn't it a fact you went to that basement first to get that rifle and then you walked in the garage where you shot yourself with it?

A Like I said before, I went to the basement to change clothes.

Q What is the last thing you remember then?

A When I got my clothes out and turned the light out and turned around, that is the last I remember.

Q You say you turned the light out?

A Yes, sir.

Q The Court has the record. You testified the last time you don't even remember turning the light out?

MR. WATSON: I submit that is argumentative.

MR. FRANK: It is in the record.

THE COURT: Well, he can state whether he remembers so testifying.

A Like I stated before,—

Q (Mr. Frank) Do you remember testifying—

MR. WATSON: Just a minute. If your Honor please, I submit the witness has a right to answer.

THE COURT: No, he has the right to have the question answered. Do you remember testifying the last thing you remember was turning the light out?

A The last I remember, turning that light out and turning [160] around, and that was the last I remember, and a hot burning sensation in my stomach.

Q (Mr. Frank) You don't remember telling your mother or your brother or the policeman that you shot yourself so you wouldn't have to come to court?

A No, sir.

Q Do you remember at the hospital talking with the doctors about how you were shot?

A I remember talking to some of the doctors asking what had happened.

Q Do you remember telling them that you shot yourself in the stomach with a rifle so you would not have to come to court and testify?

A No, sir, I don't remember saying no such thing to them.

Q You never told the doctors in any event?

A I only repeated what I had heard.

Q I am asking you, did you tell the doctors you had shot yourself?

A No, sir.

Q Because you didn't want to go to court? Is your mother's name Frankie Dewey?

A Yes, sir.

Q Your brother's name is Homer H.

A Yes, sir.

Q Do you remember seeing them prior to the shooting that morning?

A I remember talking to them upstairs, yes, sir.

Q Do you remember talking to them after the shooting while you were still there?

A No, sir.

Q You don't remember talking to anybody after the shooting?

[161] A No, sir.

Q What time did they operate on you that day?

A I don't know.

Q Was it nighttime?

A I don't know.

Q You don't even remember?

A I don't even remember that I went to the hospital.

MR. FRANK: I have no further questions.

MR. WATSON: I have no questions, Your Honor.

THE COURT: All right. You may step down.

MR. FRANK: Your Honor, at this time the State wishes to call—

THE COURT: Oh, pardon me. Have you finished?

MR. WATSON: Yes, Your Honor, I have finished.

THE COURT: All right.

MR. FRANK: The State is ready.

THE COURT: All right. You may proceed.

MR. FRANK: At this time the State wishes to call Frankie Dewey.

STATE'S CASE ON MOTION

FRANKIE DEWEY, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name.
A Frankie Dewey.
Q Where do you live?
A 630 East Red Bud.
Q Is James Drope your son?
A Yes, sir.
Q Did you see your son on June 25th, 1969?
A I sup- [162] pose I did.
Q The morning he was shot?
A Yes, sir.
Q Did you see your son after he had been shot?
A I saw him laying on the ground.
Q Did your son talk to you at that time?
A No, sir. He couldn't.
Q Are you telling the Court that your son said nothing to you at that time?

MR. WATSON: Just a minute. Your Honor please I am going to object to that as argumentative. This is Mr. Frank's direct examination of his own witness. I object to him arguing with her.

MR. FRANK: Your Honor, at this time I ask that this witness be declared a hostile witness on the basis of the official police report of the St. Louis Police Department would show a statement to the contrary that this witness made.

MR. WATSON: I don't know about any police report.

THE COURT: Well,—

MR. WATSON: I move whatever reference he made to the police report be stricken.

MR. FRANK: That is the reason for asking for the hostile witness proceeding.

THE COURT: Be overruled.

Q (Mr. Frank) Isn't it a fact, mam, that your son told you after he had been shot, after he shot him-

self that he had [163] shot himself so that he would not have to come to court that morning?

A No, sir, that is not true.

Q Isn't it a fact, mam, that you told Police Officer Dampier that your son told you that he had shot himself so he would not have to come to court that morning?

A I did not.

MR. WATSON: I have to object to that,—

A I am taking an oath today; I did not.

MR. WATSON: Just a minute, Mrs. Dewey. I would have to object to that, Your Honor please, for the reason it would be hearsay.

THE COURT: Be overruled. It is the statement of this witness?

MR. FRANK: That's right.

THE WITNESS: I did not say it.

MR. WATSON: Third party.

THE COURT: It is an effort to show a contradictory statement. All right. Proceed.

Q (Mr. Frank) Isn't it a fact that prior to this occasion your son had also told you on numerous occasions that he would rather kill himself than testify before the jury?

MR. WATSON: I object—

A No, sir. I don't know who told you all that but it is not true.

Q (Mr. Frank) Isn't it a fact that your son James Drope [164] kept his clothes and all his belongings in the basement of your other son's house?

A Part of his clothes was over there because we was washing over there.

Q Isn't it a fact that is where he kept his rifle also?

A That rifle, I hadn't seen that thing in years and I thought it was in the country. I did not see that rifle.

Q That was Jimmie's rifle, wasn't it?

A No, it was not.

Q It wasn't?

A And I didn't tell the police officer that either.

Q And you didn't tell the police officer either?

A Because I bought those rifles a long time ago.

Q Whose rifles were they?

A They belonged to my youngest son.
Q Who is he?
A Donald.
Q Donald?
A Either belonged to Donald or Homer; two rifles just alike.
Q That was Homer's house where that rifle was?
A That's right. That is where it was when it was in the garage.
MR. FRANK: I have no further questions.
MR. WATSON: I have no questions, Your Honor.
THE COURT: (Q) Did you say the rifle was in the garage?
A That is where we found it, sir, and he was laying out- [165] side the garage.
THE COURT: All right.
MR. WATSON: Step down, Mrs. Dewey.

(Witness excused)

FRED H. SCHIEFELBEIN, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name, sir?
A Fred H. Schiefelbein.
Q What is your business or occupation?
A Clerk in the Record Section, Metropolitan Police Department, City of St. Louis.
Q And, sir, did you bring anything with you?
A I brought records in answer to a subpoena duces tecum.
Q And are these the records of a shooting, suicide attempt, on June 25th,—
MR. WATSON: Just a minute. I am going to object. Just a minute. I am going to object, if Your Honor please, for the reason that is leading and suggestive and it is attempting to place into evidence something that is not—

THE COURT: He hasn't offered it yet. It will overruled, but you just ask him what they are.

MR. WATSON: That wasn't his question, Your Honor.

THE COURT: What was his question?

MR. WATSON: The question was, he is talking about an attempted suicide and things of that nature, Your Honor, to which I object.

[166] THE COURT: Well, this is just a description being used in that sense. All right.

Q (Mr. Frank) Is there a heading on that police report that shows the type of police report it is, sir?

A Yes, sir.

MR. WATSON: Your Honor please, I am going again to object to it because that is merely a self-serving document.

THE COURT: I am not going to make him a record. I am going to let him identify it. I don't know what it is unless it is identified. We are not trying it before a jury.

MR. WATSON: I know, but he is talking about what heading was placed on the report.

THE COURT: Just for the mere report for identification. It is not going to have influence on the Court.

Q (Mr. Frank) For identification purposes, what is the heading on the report?

A "Injury and Sick Report, Attempted Suicide".

Q What is the date of the report?

A 6/25/69.

Q The time?

A 8:16 A.M.

Q Is that the time it was reported to the police?

A Sixth District.

Q Who reported that attempted suicide to the police?

A A person by the name of Dewey. I don't know if that is a surname or what. That is all it has on it.

MR. FRANK: May the record show that the Dewey being [167] the mother of the defendant.

MR. WATSON: Just a minute. There are also other Deweys besides Mrs. Dewey.

THE COURT: I know that. All he is showing that Dewey is the name of the mother, and we already know that because she has testified.

MR. WATSON: We know that.

Q (Mr. Frank) Who are the officers that prepared that report?

A Dampier.

Q Is he Patrolman Dampier?

A Yes, sir; Jerome.

Q Of the Fifth District?

A That's right.

Q And, sir, is this record kept in a normal course of business?

A It is.

Q Is it a part of your responsibility to keep these records?

A That's right.

MR. FRANK: Your Honor, at this time the State wishes have have marked as State's Exhibit 1 the actual police record which shows the attempted suicide in this case.

MR. WATSON: Your Honor please, I certainly object to Counsel—

THE COURT: No, he can mark it, but—

MR. FRANK: All I am doing is marking it at this time.

(The reporter thereupon marked a police report for identification as State's Exhibit 1.)

THE COURT: He can mark it. He can make an offer of [168] proof.

MR. WATSON: That's right.

THE COURT: The Court will rule at the proper time.

MR. FRANK: I have no further questions at this time of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. WATSON:

Q Mr.—I am sorry.

A Schiefelbein.

Q Schiefelbein, is that right? The records that you have, that have been just marked for identification, are the records of the Police Department made by some officer, is that correct?

A By—in many cases there are several officers in the report. In most cases it is one officer.

Q This particular one, is it made by one officer?

A Yes, sir.

Q And what was the officer's name?

A Dampier.

Q Now, of course, this information that is in there is a document held by your—made for your Police Department for their records, is that correct?

A If I may explain, the officer, after he gets whatever information he needs, he makes a report to his commanding officer. And there is a sergeant in charge if the lieutenant or captain is not in there, that person's name appears as having witnessed the report of the officer. It is really a report of an incident to the Chief of Police which must be made all the time.

Q But this particular document is not made by Officer [169] Dampier; it is made out by a detective sergeant or somebody there at the police station?

A No, sir, he makes it out and the detective sergeant verifies that this officer made it out.

Q In other words, he writes it—Dampier writes it and the other officer verifies it?

A That is true. If you care to look, this is what I mean (pointing on report). This is the officer in this block; and this is the supervising officer on this end (pointing). And that is a part of the police procedure. It must be—every incident must be accounted to the Chief of Police, whether he looks at it or not.

(Off-the-record discussion)

THE WITNESS: This is Dampier all the way, submitted by Officer Dampier.

Q (Mr. Watson) I see. The lower part of page one of this report was made out by a Sergeant Leo Sneedmeyer, is that correct?

A No, sir, he is the one that supervised the report. It was made out by Patrolman Jerome Dampier whose serial number in the Police Department is 6604.

Q Well, let me read it to you. It reads: "At about 8:16 this date Patrolman Jerome Dampier, 6604, in charge of Car No. 5, was directed to 5248 Bulwer." Now, who was it that wrote that in there? Is that Sneedmeyer's notes or records?

A No, sir, that is the police officer's.

Q In other words, that is the police officer talking [170] about himself, is that correct?

A Yes, sir.

MR. WATSON: All right. Thank you.

(Witness excused)

MR. FRANK: Your Honor, I would like to call the medical records librarian from City Hospital No. 1.

NORMA SNOWDEN, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Mam, please state your name.

A Norma Snowden.

Q Miss Snowden, what is your business or occupation?

A Clerk at the St. Louis City Hospital, 1515 Lafayette, in the Medical Records.

Q And as a clerk in Medical Records, what are your responsibilities?

A Ah, to answer to summonses and to keep the medical records.

Q And did you in fact bring something with you today from that hospital?

A Yes, I did.

Q What did you bring with you, mam?
A X rays and a medical chart on one James Drope.
MR. FRANK: At this time mark this State's Exhibit 2.

(The reporter then marked a City Hospital record anent James Drope, for identification as State's Exhibit 2.)

Q I show you that which is marked State's Exhibit 2. Can you identify that for the court?
A Yes, I can.
Q What is that, mam?
A A record on James Drope.
Q Is this part of the official records of City Hospital 1?
[171] A Yes, it is.
Q All right. When are these notes recorded there in this record?
MR. WATSON: Do you mind if I look at it, please?
MR. FRANK: May I have it for just a moment (handing exhibit to Mr. Watson).
MR. WATSON: This is a very lengthy document. Is there any particular portion you want to refer to?
THE COURT: Pardon me. You can handle it. Just get it identified and then offer it subject to your objection as to materiality, relevancy in any manner.
MR. WATSON: That is correct; I'll agree to that.
Q (Mr. Frank) All right. There are handwritten notes in this file. Are these handwritten notes made at the approximate time of treatment or viewing of the victim in this case, the defendant?
A Yes, they are.
Q Let me call your attention now—
THE COURT: I don't think Mr. Watson has any objection to them being hospital records?
MR. WATSON: I don't.
THE COURT: But he may ooject to any part you want to read as to materiality.
MR. WATSON: That is right, Your Honor.
Q (Mr. Frank) All right, Your Honor. I am now

referring to a page which is unnumbered as far as I can see.

[172] A May I see it? "25".

Q Is that "25"?

A (Nodding assent).

MR. FRANK: Your Honor, I am now referring to Admission Notes, 6-25-69, written in longhand by the doctor on duty at that time.

MR. WATSON: And, Your Honor, we will object to that at this time for the reason it is wholly immaterial and irrelevant in regard to this case and this motion, and is a record made by some other person, and it would be hearsay, Your Honor.

THE COURT: Well, pardon me. I can't pass on it. Is this a statement of the doctor or is this a statement of the defendant?

MR. FRANK: It is a statement that the defendant makes to the doctor.

THE COURT: All right. Be overruled.

Q (Mr. Frank) I call your attention to this section (pointing).

A (Reading) "This morning he shot himself with a .22 caliber at the alley and was brought in the emergency room. The cause of this was not definite, but he stated some problem—"

Q "Some problem with the law"?

A "—with the law."

MR. FRANK: All right. Your Honor, that statement of the defendant that he shot himself and had had some problems to do with the law, I ask to be admitted into evidence as a statement by the defendant to the doctor in charge at that time.

[173] MR. WATSON: If your Honor please, I am going to object to that for the reason it would be immaterial to any issue in this case. It is irrelevant, and, furthermore, if it were made, it was made while the man—from the information received or read by this young lady it was made quite a while after he had been shot. And there is no information here as to what condition he was in, whether he was, shall we say, coherent, and whether he knew what he was saying, if anything.

And it is merely a statement by a third party who is not present, Your Honor. I object to it for that reason and move that that answer be stricken.

THE COURT: Well, I think if the record shows that he is semi-conscious or rambling and not responsible for what he says, the objection should be sustained. Is there anything in that hospital record that shows that he was semi-conscious or rambling?

MR. FRANK: Your Honor, I can establish this man's state of mind with my next witness.

THE COURT: Not on that. Is there anything in there that shows that he was unconscious, having hallucinations or anything like that?

MR. FRANK: Your Honor, I call your attention to the following page which uses the word "conscious", showing the man is conscious, and there is a review of the general physical condition.

[174] THE COURT: Is that the entry note?

MR. FRANK: Yes, these are all the entry notes here.

THE COURT: Unless there is some showing that the doctor noted that he was rambling, incoherent.

MR. FRANK: The doctor shows that he is nervous, Your Honor, but shows that he is conscious.

MR. WATSON: Where do you see that?

MR. FRANK: "The man is nervous but conscious. X rays taken of the chest—."

THE COURT: All right. It will be overruled.

MR. WATSON: Well, I presume that word that the doctor wrote is "conscious" but it certainly doesn't look like it. Let's compare that with the one down here. Does it look like that?

MR. FRANK: It is the same.

MR. WATSON: I'll bring it out on cross-examination.

MR. FRANK: Now, I ask that that be admitted into evidence at this time as State's Exhibit 2.

THE COURT: Very well.

MR. FRANK: I have no further questions of this witness at this time.

CROSS-EXAMINATION

BY MR. WATSON:

Q What was your name, young lady? I am sorry, I don't recall it.

A Snowden.

Q Miss Snowden, directing your attention to the center of [175] this page, not numbered, but it is the same page as Mr. Frank was just talking to you about. I direct your attention to the center of that. Will you read for us please from the word "abdomen" on down?

MR. FRANK: What is the area?

MR. WATSON: I told her. Right there (pointing). She knows.

THE WITNESS: Yes.

MR. FRANK: Well, this area—just a minute. I want to make an objection. This area hasn't anything to do with the consciousness. It has to do with the abdomen and the actual location of the two bullets.

THE COURT: All right. You may read it.

THE WITNESS: I cannot make it out.

THE COURT: What is that under, "Abdomen"?

MR. WATSON: Yes, an abbreviation on the left side is abdomen—Abd.

THE COURT: I can't read it.

MR. WATSON: Well, the record offered by the State, honestly, I can't read it either. I want to know what—

THE COURT: How do you know it ought to be introduced then?

MR. WATSON: He has already introduced it. I want to know what he is introducing. I can't read it.

MR. FRANK: For the record, the only thing that the [176] State was introducing—

MR. FRANK: Pardon me. We know what you have introduced. Proceed.

Q (Mr. Watson) Let me call your attention to this word on the righthand side where it says "nervous". What does that say alongside of it? Can you interpret it?

A I feel it is an abbreviation of "consciousness".

Q An abbreviation for "consciousness"?

A Yes, sir.
Q It isn't written out like here (pointing)?
A And also feel—
Q This is "consciousness" too?
A Yes, and he stopped right there.
Q And he said according to this that he was nervous but was conscious. Is that your interpretation of it?
A Yes, sir.
MR. WATSON: I believe that is all, Your Honor.
THE COURT: All right. You may step down.
MR. WATSON: Oh, may I ask this witness one more question?
Q Miss Snowden, you were not subpoenaed to be here on the 25th day of June, were you, 1968—'69, rather?
A No.
Q This is the only time you have been subpoenaed?
A I don't remember. If I wasn't involved, someone else might have been.
[177] Q You have never been here before on this case?
A No, I haven't.
MR. WATSON: All right. That is all.

(Witness excused)

PATROLMAN JEROME DAMPIER, sworn, testified:

DIRECT EXAMINATION

BY MR. FRANK:

Q Please state your name, sir?
A Patrolman Dampier.
Q What is your full name?
A Jerome.
Q Jerome. What is your business or occupation, for the record?
A Police Officer, St. Louis—City of St. Louis.
Q And what is your assignment or responsibility in the Department?
A Patrolman, District Five.
Q And how long have you been on the Force, sir?

A Two years.

Q On June 25th, 1969, were you working that day?

A Yes, sir.

Q On that Wednesday, sir, did you get any call around 8:00 in the morning, or 8:15 in the morning?

A Yes, sir.

Q What call, if any, did you get, sir?

A I got a call for attempted suicide.

MR. WATSON: Now, if Your Honor please, I am going to object to that. It would be hearsay.

MR. FRANK: For the record, this is an interdepartmental communication.

THE COURT: I don't think it makes so much difference. [178] I'll not take it for what it was but just the reason for his going there.

MR. WATSON: All right.

Q (Mr. Frank) Will you state again what your broadcast was, for the record?

A Attempted suicide.

Q All right. And did you get an address?

A Gave me an address on Bulwer, 5230, I believe.

Q All right. Did you go to this address at 5230 Bulwer?

A Yes, sir.

Q What is that address, Officer?

A It is a residence.

Q When you got to the residence, where did you park your vehicle?

A In front of the residence.

Q All right. And did you meet someone when you got there?

A As I got out of my vehicle I met a white female who identified herself as Frankie Dewey.

Q Did she tell you who she was?

A Yes, she said she was his mother.

Q What did she tell you, Officer?

MR. WATSON: I am going to object, Your Honor, again for the record; whatever statements were made outside the presence of the defendant are hearsay. I am going to object—

THE COURT: Well, it will not be binding on the defendant but anything she said could be used as attacking her credibility of her testimony and showing a contradictory statement.

[179] Q (Mr. Frank) Officer, will you tell the Court what she told you?

A She said he was supposed to go to court. He had been having trouble with his wife. He had shot himself and his brother had taken him to the hospital.

Q All right. And what did you do at that time, Officer?

A I checked with my dispatcher to ascertain if there was a victim of a shooting at any of the city hospitals, at which time he told me that there was one at City Hospital No. 1.

Q Officer, after that call did you check the premises?

A Yes, I did. I checked the garage.

Q Why did you go to the garage?

A Well, that is where the shooting is supposed to have taken place.

Q Who told you that?

A The mother.

Q That being Mrs. Dewey?

A Mrs. Dewey.

Q That the defendant shot himself in the garage?

A Yes, sir.

MR. WATSON: Your Honor, I assume my objection is going to all this line.

THE COURT: Yes.

Q (Mr. Frank) What did you find in the garage?

A I found a .22 caliber rifle lying on the ground inside the garage.

Q Officer, did Mrs. Dewey identify the rifle?

A She did. She identified it as belonging to her son, the one who had shot himself.

[180] Q Now, Officer, did you in fact go to the hospital?

A Yes, I did.

Q All right. At the hospital did you talk to—

THE COURT: Pardon me. I want the record to show that at this time any statements made by this woman is only admitted for the sole purpose of the credibility.

MR. FRANK: Credibility?

THE COURT: All right.

Q (Mr. Frank) At the hospital you also talked to a Homer K.? Is that correct?

A Yes, that's correct.

Q That is the brother of the defendant in this case?

A That's correct.

Q Did you take any statement from him?

A Yes. He told me that his brother shot himself in the stomach, and he brought him to the hospital.

Q All right. After talking to Homer K., did you in fact see James Drope, the defendant in this case?

A Yes, I did.

Q Where did you see him?

A When I saw him, he was laying on a stretcher out in the hall of the Emergency Room.

Q Can you tell the Court if you talked with him at that time?

A Yes, I did.

Q All right. Can you tell us whether or not he was conscious?

A Yes, he was conscious.

Q Can you tell us, was he able to talk with you?

[181] A Sure he was able to talk with me.

Q Can you describe his speech?

A It was clear.

Q Clear. Was it coherent?

A Yes, it was.

Q All right. Now, at that time when you talked with him, what did he tell you, Officer?

A He told me—

MR. WATSON: Now, if your Honor please, I must object to this for the reason that I understood his testimony is to be offered to attack the credibility of Mrs. Dewey.

THE COURT: Up to this time her statement, but that isn't the main purpose.

MR. WATSON: All right. You are going beyond that?

THE COURT: Yes.

MR. WATSON: O. K.

Q (Mr. Frank) Officer, at that time did the defendant make a statement to you?

A Yes, he did.

Q What did he say to you?

A He said he was supposed to go to court for rape, and he didn't do it; he rather be dead than to go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself.

Q Did he at any time when he was talking with you mention the word "blackout", that he couldn't remember how he was shot?

A No, sir, he didn't.

Q Officer, did you reduce this information to a police report?

A Yes.

[182] Q I show you that which is marked State's Exhibit 1. Will you look at that and identify that for the Court?

A Yes. This is the report I made, a copy of it anyway.

Q Does that report include all the statements taken from all the people in this case?

A Yes, it does.

Q Also includes the statement by the defendant in this case?

A Yes, it does.

Q In fact, it includes the statement you just made to the Court, is that correct?

A That's correct.

Q At any time during the time you were talking with Drope, did he lose consciousness?

A No, he didn't.

Q Did you determine his injury, the severity of his injury at that time?

A Before I talked to him I talked to the doctor to find out his condition, and the doctor said he wasn't

critical, upstairs he would be admitted and I could interview him, at which time I did.

Q You actually got permission from the doctor?

A From the doctor, yes.

Q Sometime that morning, Officer, did you talk to an officer of the Circuit Attorney's Office?

A Yes, I did.

Q And did you relate the police report to that officer of the Circuit Attorney's Office?

A Yes.

Q And, in fact, a copy of that report was forwarded to the office immediately, is that correct?

A This is correct.

[183] MR. FRANK: I have no further questions at this time.

CROSS-EXAMINATION

BY MR. WATSON:

Q Officer, what time was it when you conveyed this information to the office here in the Circuit Attorney's Office?

A Oh, it must have been around 9:00 o'clock, 9:15, around there, a little after.

Q About 9:00 or 9:15?

A About 9:00 or 9:15.

Q You conveyed all this information that is contained in this police report to the officer from the Circuit Attorney's Office; is that correct?

A This is correct. I made a call from the station.

Q Who was this man in the Circuit Attorney's office?

A Named Billings.

Q Mr. Billings. I see. Now, Officer, you say that would be about 9:00 or 9:15 on the morning of June 25th, 1969; is that right?

A Yes, sir, that is correct.

Q The same day this occurred?

A Yes, sir.

Q Now, when you say you interviewed Mrs. Dewey, and she said that her son shot himself, is that your testimony?

A Yes, sir.

Q Did she tell you, officer, that she saw him shoot himself?

A No, sir, she didn't.

Q She just said that he shot himself?

A Yes.

Q But didn't say that she had seen it?

A No, sir.

[184] Q Then you say you talked to his brother later at the City Hospital?

A Yes, sir.

Q And he also told you that his brother had shot himself?

A Yes, sir.

Q Did you ask him whether he had seen him shoot himself?

A No, sir, I didn't.

Q And did he ever intimate or say to you that he did see him shoot himself?

A No, sir.

Q He did not. Officer, when you had all this information at 9:00 o'clock on the morning of June 25th, 1969, were you requested by the Circuit Attorney's Office and State of Missouri to come into court and testify about this information in regard to this information you had received at that time by 9:15 that morning?

A Requested on the same date?

Q Yes, sir.

A No, sir.

Q You were not requested to come here at all?

A No, sir, not on the same date.

MR. WATSON: I believe that is all, Your Honor.

REDIRECT EXAMINATION

BY MR. FRANK:

Q Just one final question, Your Honor. Officer, isn't it a fact that your police report indicates that you per-

sonally talked to Officer Billings of our office, and at that time he requested a copy he immediately forwarded to his office?

A That is right.

Q That is actually in your police report?

A That is [185] indicated in the report.

MR. FRANK: No further questions.

RECROSS-EXAMINATION

BY MR. WATSON:

Q It is indicated in your report that you talked to Officer Billings at what time?

A I don't believe a time is indicated.

Q I believe you testified it was between 9:00 and 9:15?

A Yes; correct, between 9:00 and 9:15.

Q And when you gave that information to Officer Billings, he did not request you to come into this court and testify at that time?

A No.

MR. WATSON: That is all.

MR. FRANK: I have no further questions.

(Witness excused)

MR. FRANK: For the record, Your Honor, at this time the State is going to offer into evidence State's Exhibit 1, that being the official report made by this officer containing all statements, all admissions by the parties involved.

MR. WATSON: We are going to object to this, Your Honor please.

THE COURT: Very well, it will be overruled.

MR. FRANK: The state has no further evidence.

MR. WATSON: I have. Well, just a minute, please, Your Honor.

DEFENDANT'S CASE IN REBUTTAL.

[186] JAMES EDWARD DROPE, the defendant herein, having been previously sworn and examined, testified further in rebuttal:

DIRECT EXAMINATION

BY MR. WATSON:

MR. FRANK: Just a minute. I would like to know the purpose of this.

THE COURT: You will find out by the questions asked.

Q (Mr. Watson) Mr. Drope, you heard this police officer testify, Officer Dampier, did you not?

A Yes, sir.

Q That you had made a certain statement to him? Did you make such a statement to him?

THE COURT: Oh, pardon me. He has already denied that. He denied that on cross.

A I never seen him before.

THE COURT: He said he did not tell the officer that he shot himself. "I don't remember talking to anyone about anything at the hospital."

MR. WATSON: That's right.

THE COURT: All right.

MR. WATSON: That is all.

(Witness excused)

THE COURT: All right. Is there anything further you want to say with reference to the motion for a new trial or do you intend to submit a memorandum?

MR. WATSON: Your Honor, I would submit a memorandum [187] with regard to the law in it.

THE COURT: This is on the motion for a new trial?

MR. WATSON: That's right, Your Honor.

THE COURT: How many days do you want to submit it?

MR. WATSON: Well, I am leaving for Switzerland next Thursday with the Bar Association. So it would have to be before then.

THE COURT: All right. Will you give the Clerk a memorandum, Mr. Watson and Mr. Frank,—

MR. WATSON: I'll do that, Judge.

THE COURT: —motion for new trial heard and to be taken as submitted on the filing of the last brief. Defendant allowed ten days and the State allowed five.

MOTION FOR NEW TRIAL OVERRULED.

Thereafter, on October 15, 1969, the defendant's motion for a new trial having been heard and submitted and considered by the Court was by the Court overruled. The Court filed in said cause the following memorandum in connection therewith:

"MEMORANDUM AND RULING ON DEFENDANT'S MOTION FOR A NEW TRIAL"

(Caption and formal parts omitted)

"The only point made in defendant's memorandum in support of his motion for a new trial is the failure of the record to show 'any reasons for defendant's absence during a portion of the trial'.

[188] "The defendant was on hand and present during the first and second day of trial and when the court adjourned to June 25th, 1969, for further proceedings. The defendant failed to appear on June 25th, and the court after an hour's wait proceeded with the trial. The information the court received over the phone and which was checked by the Circuit Attorney's Office through the Police Department with the hospital may not appear in the trial proceedings, but it seems ridiculous to urge that the State or the Court should be required to prove that the defendant's absence was voluntary. Neither the State nor the Court should be required to play hide-and-seek with the defendant. Common sense dictates that the burden is on the defendant to show his absence was

not voluntary; any other rule places the control of the progress of the case in the hands of the defendant and could well lead to bizarre situations and disrespect for the Court.

"However, the whole matter *is* in the record. The defendant was the movant in making a record of the cause of his absence at the hearing on the motion for a new trial. The Court finds from the evidence that the absence of the defendant was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial. In this type of case where the victim suffers an ordeal in testifying, it is all the more necessary for the Court to carefully scrutinize the defendant's conduct in causing his absence from the trial of the case. The [189] victim in this case faced the prospect of testifying to the revolting conduct of four more persons charged with rape as a result of this occurrence.

"The Court has reviewed the instructions and the testimony and finds no error in the trial or any reason why the motion for a new trial should be sustained.

"THEREFORE, it is ordered and adjudged that the motion for a new trial, having been heard and submitted and considered by the Court, is hereby overruled, and sentencing is set for Tuesday, October 21st, at 9:15 A.M."

/s/ "Daivd A. McMullan
Judge—Div. #19.

Filed October 15, 1969.

ALLOCUTION AND SENTENCE

Thereafter, on October 21st, 1969, the defendant, James Edward Drope appeared in open court in person and with his attorney, Mr. Jack E. Koslow (of the law office of Mr. Lester Watson). Mr. Michael Frank, Assistant Circuit Attorney, appeared for the State of Missouri. Thereupon, the following proceedings were had in said cause:

MR. KOSLOW: I am appearing for Mr. Lester Watson who is the attorney of record, who is out of the country.

THE COURT: This is the case of James Edward Drope, Cause No. 405-R. Have you given the reporter your full name?

MR. KOSLOW: Yes, I have, Your Honor.

[190] THE COURT: And you represent Mr. Drope?

MR. KOSLOW: Yes, I am here this morning standing in for Mr. Watson.

THE COURT: All right. Will you stand, James Edward Drope. In Cause No. 405-R, on June 25th, 1969, a verdict of guilty was rendered against you by the jury after a trial, finding you guilty of rape. And the Court assessed the penalty on July 21st at life. The motion for a new trial has been overruled. And do you now have any legal cause to show why judgment should not be pronounced against you.

(Discussion between Mr. Drope and Mr. Koslow, out of the hearing of the reporter)

MR. DROPE: (the defendant): I can't find no legal reason at this point.

THE COURT: All right. The answer then is no?

MR. DROPE: What I said, Your Honor.

THE COURT: And do you have any legal cause to show why judgment should not be pronounced against him?

MR. KOSLOW: No legal cause at this time.

THE COURT: All right. In view of the verdict of guilty brought in by the jury and the punishment imposed by the Court, and the motion for a new trial having been overruled, you will be sentenced to the Department of Corrections for the balance of your natural life.

[191] JUDGMENT OF CONVICTION.

RECORD ENTRY—Tuesday, October 21, 1969.

(Caption and formal parts omitted)

"Now, on this day, comes the Assistant Circuit Attorney for the State, and also comes the defendant herein, in person, in the custody of the Sheriff of this City, and in the presence of Lester Watson, by Jack Koslow, Attorney and Counsel, in open Court. Whereupon, the Court orders the Official Court Reporter to take notes to preserve the evidence.

"Whereupon, said defendant is informed by the Court that he has heretofore been found guilty on June 25, 1969, by a Jury of the offense of Rape and the penalty fixed by the Court at imprisonment in the State Department of Corrections for the remainder of his natural life; and being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him according to law, and still failing to show such cause, it is therefore sentenced, ordered and adjudged by the Court that the said defendant, JAMES EDWARD DROPE, having been found guilty by a Jury as aforesaid under an Indictment against him, be committed to the State department of Corrections for the Remainder of his Natural Life, there to be kept and committed until the judgment and sentence of this Court herein be complied with or until the said defendant shall be otherwise discharged by due course of law.

"It is further considered, ordered and adjudged by the [192] Court, that the State have and recover of said defendant the costs in this suit expended, and that hereof execution issue therefor."

* * * *

[196]

* * * *

"NOTICE OF APPEAL"

"Notice is hereby given that the above-named defendant, James Edward Drope, hereby appeals to the Supreme Court of Missouri, from a final order entered in the above proceedings, 'denying defendant's motion for a new trial, which was denied October 21, 1969, upon which conviction he was assessed a term of imprisonment for the remainder of his natural life.'"

/s/ "James E. Drope, Defendant—pro se."

Filed March 12, 1970, by leave granted by the Mo. Supreme Court.

* * * *

IN THE SUPREME COURT OF MISSOURI
DIVISION NUMBER TWO

[Reported at 462 S.W.2d 677, Filed January 11, 1971]

No. 55 489

STATE OF MISSOURI, RESPONDENT

v.

JAMES EDWARD DROPE, APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

The Honorable David A. McMullen, Judge

STOCKARD, *Commissioner*:

Charged as a second offender, defendant was found guilty by a jury of rape. The court assessed the punishment at life imprisonment.

The evidence presented by the State permitted a finding by the jury that on January 17, 1969, defendant and four other men, cooperating together, tied defendant's wife to a bed, and while defendant held a gun at her head, each had sexual intercourse with her against her will and with force and violence to her person.

Defendant first contends that his motion for a verdict of acquittal should have been sustained because "the State failed to produce sufficient evidence to sustain the indictment in that defendant was not charged with aiding and abetting others in the commission of the crime of rape, and he himself, could not be charged with raping his own wife."

The statutory definition of rape, § 559.260, RSMo 1969, V.A.M.S., does not by express language exclude the accused's wife as a person upon whom the crime may be committed. However, for the purposes of this opinion we shall assume that the statute incorporates the common law rule that a husband cannot be guilty of rape

based upon his forceful intercourse against the will of his wife. See 84 A.L.R.2d at p. 1019.

Defendant was charged as a principal in that he and others "did unlawfully and feloniously make an assault" upon his wife and "did then and there unlawfully, feloniously and forcibly rape, ravish and carnally know [her] against her will." It is provided in § 556.170, RSMo 1969, V.A.M.S., that a principal in the second degree in the commission of any felony "may be charged, tried, convicted and punished in the same manner, as the principal in the first degree." One who is present at the place of the crime and aids and abets the prepetrator thereof is a principal in the second degree. 22 C.J.S. Criminal Law § 85; 21 Am. Jur.2d Criminal Law, § 121. As such, he may be charged and tried as a principal in the first degree, § 556.170, supra; State v. Murray, Mo., 445 S.W.2d 296, 298; State v. Sheard, Mo., 276 S.W.2d 191, without setting out in the charge the facts by which he aided and abetted, 42 C.J.S. Indictments and Informations § 147, and without alleging a conspiracy. State v. Reed, Mo., 453 S.W.2d 946. The charge of defendant as a principal was authorized.

Defendant argues, however, that to charge him as a principal results in uncertainty as to the charged offense, and that one reading the statute pertaining to rape would not know that the conduct of defendant relied on by the State would constitute a violation of that statute. This implies a reliance on § 18(a), Art. I, Constitution of Missouri wherein it is provided that an accused has the right "to demand the nature and cause of the accusation." In State v. Spica, Mo., 389 S.W.2d 35, a similar contention was made when the defendant, being an accessory before the fact, was charged as a principal pursuant to § 556.170, supra. It was held that such a charge does not infringe the above constitutional provision. The same is true when the basis for the charge as a principal pursuant to the statute was conduct which resulted in the accused being a principal in the second degree.

Defendant argues that in no event could he be found guilty of rape of his wife, even though the basis of the

charge was that he aided and abetted another in the commission of the offense. One not the husband of the victim can be found guilty of rape on the basis of aiding and abetting even though he does not engage in the act of sexual intercourse. State v. Sheard, supra. No Missouri case is cited to us, and we have found none, holding that as an aider and abettor a husband may be found guilty of the rape of his wife. However, the issue has been ruled in other states.

In an annotation entitled "Criminal responsibility of one cooperating in offense which he is incapable of committing personally," 131 A.L.R. 1322, rape cases are annotated in which the conviction of the husband of rape for aiding and betting another was held proper. In another annotation at 84 A.L.R.2d 1017, entitled "Criminal responsibility of husband for rape, or assault to commit rape, on wife," the general rule is stated the "While a husband may, without criminal liability for rape, enforce sexual connection for himself upon his wife despite her actual denial of his right, he may not enforce sexual intercourse upon her through the instrumentality of another man." Cases are then cited in which it is held that a husband who does so may be charged and found guilty of the crime of rape. Cases so holding include the following: People v. Chapman, 62 Mich. 280, 28 N.W. 896, 4 Am. St. Rep. 857; In re Kantrowitz, 24 Cal. App. 203, 140 Pac. 1078; Kitchen v. State, 101 Tex. Crim. 439, 276 S.W. 252; Bohanon v. State, Okla. Cir., 289 P.2d 400; Cody v. State, Okla. Cir., 361 P.2d 307; 84 A.L.R.2d 997; Elliott v. State, 190 Ga. 803, 10 S.E.2d 843; State v. Boyland, 24 Kan. 186; State v. Olsen, 138 Or. 666, 7 P.2d 792 (dicta); People v. Damen, 28 Ill. 2d 464, 193 N.E.2d25; State v. Digman, 121 W. Va. App. 499, 5 S.E.2d 113; State v. Blackwell, Or., 407 P.2d 617. We have not found any case disapproving the above general rule.

We conclude that defendant was properly charged, and that under the facts of this case he was properly found guilty of rape even though the victim was his wife.

Defendant next contends that the "verdict was against the weight of the evidence." Our brief statement of facts,

and the ruling on defendant's first point, demonstrates that a submissible case was made. The determination of the credibility of the witnesses is for the jury, and an appellate court does not weigh the evidence. State v. Dowe, Mo., 432 S.W.2d 272. This point presents no issue for appellate review.

Defendant's third and fifth points are that the court erred in proceeding with the trial when he was absent, and that there was "no evidence upon the record" that he voluntarily absented himself from the trial.

The trial started on June 23, 1969. On June 29 [sic] after the testimony of four witnesses had been taken, the court recessed the proceedings. Defendant was free on bond, and the following morning he did not appear in court. The record shows that the court stated to the jury that "We were delayed through no fault of either the Court or the attorneys," and that defendant's counsel then moved for a mis-trial "in view of the fact that the defendant * * * shot himself this morning." The court then stated that it had "already decided that the matter would proceed for trial," thereby implying that the matter had previously been discussed, apparently in chambers or at least off the record. When defense counsel stated that it would be difficult "to go to trial without a client," the court stated: "That is the difficulty * * * that your client brought about, not you, not the court. He was on bond and his responsibility [is] to be here. So the Court will proceed with the case." Four additional witnesses were then heard. In addition, the hearing was held to prove the prior conviction. During this testimony in the absence of defendant, his counsel was present and participated in the trial by entering objections and by cross-examination.

In defendant's motion for new trial, error was assigned in proceeding with the trial while he was absent. A hearing was held in which defendant testified that on the morning of June 25 he had gone to his brother's house to change clothes, and that he remembered nothing concerning the circumstances of being shot except that he felt a burning pain in his stomach and later woke up in the hospital. He denied making any statements that

he had shot himself to avoid attending trial. The police officer who investigated the matter testified that at the hospital he talked to defendant who told him, in the words of the officer, that "he was supposed to go to court for rape, and he didn't do it; he [would] rather be dead than go to trial for something he didn't do. So he got his rifle out of his basement and went to the garage and shot himself." In ruling on the motion for new trial, the court found that defendant intentionally shot himself to avoid attending the trial.

We disagree with defendant's contention that there is "no evidence upon the record" that he voluntarily absented himself. The court made such a determination before proceeding with the trial, although the basis for that determination is not fully disclosed. However, when defendant is free on bond, and he does not appear at the appointed time, it is presumed that the absence is voluntary until established otherwise. People v. Steenbergen, 31 Ill.2d 615, 203 N.E.2d 404, certiorari denied 382 U.S. 853, 86 S.Ct. 104, 15 L.Ed.2d 92; State v. Cumbo, 96 Ariz. 385, 396 P.2d 11; Cox v. Hand, 185 Kan. 780, 347 P.2d 265, certiorari denied 363 U.S. 822, 80 S.Ct. 1265, 4 L.Ed.2d 1520. In any event, the circumstances were presented in full at the hearing on the motion for new trial, and the trial court affirmatively found that defendant did voluntarily absent himself. We find no reason to disagree with the evaluation by the trial court of the testimony on this issue, and we give due deference to its findings and conclusion. We shall, therefore, rule this issue on the basis that, as the trial court found, defendant voluntarily and intentionally inflicted a wound on himself with the intent to make his presence at the trial impossible.

Art. I, 18(a), Constitution of Missouri, V.A.M.S., provides that "the accused shall have the right to appear and defend, in person and by counsel," and Supreme Court Rule 29.02, V.A.M.R., provides that no person shall be tried upon an indictment or information for a felony unless he be personally present during the trial. However, Supreme Court Rule 29.03 states that in all cases

the verdict of the jury may be received by the court and entered upon the record in the absence of th defendant, when such absence is willful or voluntary on the part of defendant. See also § 546.030, RSMo 1969, V.A.M.S. As to the constitutionality of the provisions of Rule 29.03, see State v. Hope, 100 Mo. 347, 13 S.W. 490, 8 L.R.A. 608.

In this case the defendant was absent at the time the verdict of the jury was received, but such action by the court in receiving the verdict is expressly authorized, under the factual circumstances of this case, by Supreme Court Rule 79.03, and by analogy defendant's contention is ruled by State v. McCrary, 365 Mo. 799, 287 S.W.2d 785. In that case the defendant voluntarily absented himself from the courtroom when the trial judge declared a mistrial and discharged the jury on the basis that it could not reach a verdict. See also the cases cited in the annotation entitled, "Absence of accused at return of verdict in felony cases," 23 A.L.R.2d 456, and particularly the cases cited in § 10 of the annotation. p. 478 et seq., pertaining to the waiver of the right to be present when the defendant voluntarily absents himself. We find no merit to the contention that prejudicial error resulted when the trial court received the verdict of the jury when defendant was absent.

In this case, however, defendant was also absent during a portion of the trial when witnesses for the State testified in support of the charge against him, and also when evidence was heard on an essential phase of the trial; the proof of the previous conviction to envoke the second offender act. See State v. Colbert, Mo., 344 S.W.2d 115. The essential questions are whether Supreme Court Rule 29.02 permits a waiver by defendant of his right to be present at those phases of his trial, and also whether by voluntarily absenting himself, a defendant can waive his constitutional right to be present.

In State v. Smith, 90 Mo. 37, 1 S.W. 753 (reported in the latter citation under a different name), 59 Am. Rep. 4, the defendant was absent during the entire voir dire examination of the jury and also at some preceding stakes of the trial. The circumstances which brought about the

absence was not shown, but it was ruled that the public had an interest in the trial of criminal cases, and that even if the defendant's absence be considered voluntary, there could be no waiver. It was stated that the expression of the one exception in the statute (now § 546.030 and contained in Rule 29.03), permitting the court to receive a verdict during a voluntary or willful absence of the defendant, excluded all authority to take other steps in defendant's absence. However, in State v. Brewer, 109 Mo. 648, 19 S.W. 96, it was said that the Smith case "went to the extreme," and in State v. Hope, supra, in discussing the provision now in Rule 29.03 authorizing a verdict to be received in the absence of the defendant, the court indicated that the provision was a recognition and expression of the common law waiver by defendant of a right which he had, that is, to be present at all phases of his trial. In other cases it has been held that brief absences of a defendant during the taking of evidence or during argument did not constitute prejudicial error. See State v. Gonce, 87 Mo. 627; State v. Bell, 70 Mo. 633; State v. Grate, 68 Mo. 22; and the annotation at 100 A.L.R. 480. However, the rulings seem to have been based, at least in part, on a finding that prejudice did not result, and such was the conclusion in State v. Murphy, 292 Mo. 275, 237 S.W. 529, even though it was also said that his presence "could not be waived" by defendant. In State v. McCrary, supra, defendant was absent voluntarily when the court declared a mistrial, which is not within the exception set forth in Rule 29.03. This court reviewed in detail the history of the statutory provisions as now contained in § 546.030, and restated in the above cited rules, and said this: "We think that the present wording of our statute, § 546.030, [and Rule 29.03] permitting the reception of a verdict during the voluntary or willful absence of the defendant is declaratory of a policy that such *rights* may be waived. We do not agree with the statements in State v. Smith, supra, that the expression of that exception necessarily excludes all other exceptions, and that in no other instance may the actual presence of defendant be waived. * * * We do not believe that

the legislature meant to say that the defendant must, in all events, be present at every other stage of the trial." The court then continued as follows: "But to hold that a defendant, who is at liberty during the trial, must in all events be present at every material step, is to place in his hands the power completely to nullify the trial. If he should absent himself and remain away the court would simply have to suspend all proceedings, and eventually discharge the jury and declare a mistrial. * * * Such a result is to us unthinkable. It is the duty of such a defendant 'to wait upon the court,' and to be present at all times when he may anticipate that proceedings might take place; * * *." These views expressed in the McCrary case were reaffirmed in State v. Colbert, supra, a case in which the defendant was absent at a phase of the trial other than the receipt of the verdict, and it was further stated: "The administration of justice will not best be promoted by requiring a rigid and unyielding conformance to Rule 29.02 (first clause of § 546.030), in all cases and regardless of the circumstances. Inevitably exceptional cases calling for amelioration will arise. In justice it must be held that under the particular circumstances under review appellant failed to exercise and therefore waived his right and privilege to be present." In both of these cases the absence of the defendant was the result of inattention or negligence. In the case under consideration, however, the absence of the defendant resulted from an intentional act by him done for the express purpose of preventing his presence at the trial, and we conclude such act constituted a waiver of defendant to his right to be present.

This conclusion is in accord with the general rule as applied in other states and by the federal courts.

In the recent case of State of Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353, the United States Supreme Court stated that the Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *," and that the guarantees of this clause is obligatory upon the States.

However, it was then held that an accused cannot claim the benefit of this "most basic" right while at the same time engage in disruptive conduct that makes it exceedingly difficult or impossible to carry on the trial. In the opinion in the Allen case, Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500, was cited with approval for the proposition that the court had "expressly rejected" the contention that a trial can never continue in defendant's absence. In addition, the court quoted with approval from Snyder v. State of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, that " 'the privilege [of personally confronting witnesses] may be lost by consent or at times even by misconduct.' " In the Diaz case, the Supreme Court quoted from Falk v. United States, 15 D.C. App. 446, 454, appeal dismissed, 180 U.S. 636, 21 St.Ct. 922, 45 L.Ed. 709, a case where the accused appeared for trial but fled the judisdiction before the trial was completed, as follows:

> " 'It does not seem to us to be consonant with the dictates of common sense that an accused person . . . should be at liberty, whenever he pleases, . . . to break up a trial already commenced. The practical result of such a proposition, if allowed to be law, would be to prevent any trial whatever until the accused person himself should be pleased to permit it . . . This would be a travesty of justice which could not be tolerated. . . . [W]e do not think that any rule of law or constitutional principle leads us to any conclusion that would be so disastrous as well to the administration of justice as to the true interests of civil liberty. . . .
>
> " 'The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries, and turn them into solemn farce, and untimately [sic] compel society, for its own safety, to restrict the operation of the principle of personal liberty. Neither in criminal nor in civil cases will

the law allow a person to take advantage of his own wrong.' "

For a few of the cases from other jurisdictions following the rule here advanced, see State of Arizona v. Hunt, 6 Cir., 408 F.2d 1086; Cureton v. United States, D.C. Cir., 396 F.2d 671; State v. Taylor, 104 Ariz. 264, 451 P.2d 312; State v. Cumbo, supra; People v. Steenbergen, supra; State v. Chuning, 201 Kan. 784, 443 P.2d 248, certiorari denied 393 U.S. 1069, 89 S.Ct. 726, 21 L.Ed.2d 712; State v. Way, 76 Kan. 928, 93 Pac. 159, 14 L.R.A., N.S., 603; Cox v. Hand, supra.

We note that this is a capital case, that the record does not show a waiver of the death penalty, but that capital punishment was not imposed. Some authorities seem to distinguish between a waiver of the right to be present in capital cases and in felony cases generally. See the annotation at 23 A.L.R.2d 491; 23 C.J.S. Criminal Law § 975; and 21 Am. Jur.2d, Criminal Law § 286. Federal Rule 43 for criminal procedure in the federal courts, expressly excludes waiver of the right to be present in capital cases. However, we agree with the previous statement of this court in State v. McNary, supra, and with the ruling in Boreing v. Beard, 226 Ky. 47, 10 S.W.2d 447, that there is no logical basis for the distinction, absent a statute or rule on the matter. The State is interested in all felony prosecutions, and it is as much the duty of the courts in the prosecution of felony cases generally to protect the liberty of accused persons as it is their duty to protect the rights of one accused of a capital offense. As noted in the McCrary case, the legislature, in amending the statute, now § 546.030, in 1879 to authorize the entry of a verdict when the defendant voluntarily absented himself, made no distinction between capital cases and other felony cases, and we consider that a declaration of the public policy of this State.

Defendant next assigns as error the refusal of the trial court to grant a continuance "to procure additional psychiatric evaluation."

It appears from the record that an improper, or insufficient, motion for a psychiatric examination was filed

in the assignment division of the circuit court along with a request for a continuance to September 1969. The request for the continuance to September was overruled, but the case was continued to June 23. Based on a colloquy between the trial court and defense counsel at the time of trial, it appears that the assignment judge advised defense counsel that if he seriously contended that defendant needed psychiatric help he should file a proper motion, but it was never filed. On June 23, after the jury panel had been sworn on voir dire, and by implication after a discussion had been held off the record concerning the matter, defense counsel requested a continuance to September. According to the statement made by counsel to the trial court, the defendant had previously been examined by a psychiatrist who had recommended further examination, evaluation and psychiatric treatment. This report of the psychiatrist is not in the record. Whether it was called to the attention of the assignment judge does not appear. The trial judge commented on what had transpired, and stated, "let the record show they [presumably defense counsel] went back to [the assignment judge], and after being in there fifteen or twenty minutes, [he] has refused to grant a continuance." The trial court directed that they proceed, and stated that "before the jury is sworn in, I am going to ask [the assignment judge] to review this statement." There is no further ruling by the trial court on this matter prior to the time the jury was sworn in, and it is therefore presumed that the trial court's conference with the assignment judge resulted in its determination to proceed with the trial.

In the argument in his brief defendant seems to base his contention that error resulted in denying the request for a continuance on the basis that additional psychiatric care would take substantial time, and that the time was needed to prepare for trial. There is no contention in the brief that defendant did not have the mental capacity to proceed with the trial.

The granting of a continuance rests largely within the discretion of the trial court, State v. Boykins, Mo., 399 S.W.2d 70, and an appellate court should interfere with

the trial court's action only where a clear abuse of discretion is shown. State v. Thomas, Mo., 433 S.W.2d 537. The record does not demonstrate an abuse of discretion.

The final contention is that the punishment assessed is cruel and inhuman.

This court has repeatedly held that a sentence within the limits fixed by the legislature is not, without something else being shown, to be considered to be in violation of the constitutional limitation prohibiting cruel and unusual punishment. State v. Brownridge, Mo., 353 S.W. 2d 715; State v. Cook, Mo., 440 S.W.2d 461. See also the annotation at 33 A.L.R.2d 335, 368-369 of cases holding that the length of sentences alone, within the legislative prescribed limits, do not result in a violation of constitutional provision prohibiting cruel and unusual punishment. It cannot be said that the facts of this case, when considered by the trial court in assessing the punishment, could not reasonably call for the severe punishment imposed. In the absence of circumstances other than the severity of the punishment, we are constrained to rule that the punishment does not exceed constitutional limitations.

The judgment is affirmed.

ALDEN A. STOCKARD
Commissioner.

Barrett, C., Concurs.
Pritchard, C., Concurs.

PER CURIAM: The foregoing opinion by Stockard C., is adopted as the opinion of the Court.

All of the Judges Concur.

IN THE SUPREME COURT OF MISSOURI

NOVEMBER SESSION, 1970

Circuit Court No. 405-R

No. 55,489

[Filed Feb. 25, 1971. James H. McAteer, Clerk, Circuit Court for Criminal Causes]

JUDGMENT

STATE OF MISSOURI, RESPONDENT

vs.

JAMES EDWARD DROPE, APPELLANT

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of the City of St. Louis rendered, be in all things affirmed; and that the said respondent recover against the said appellant its costs and charges herein expended, and have therefor execution. It is further considered and adjudged by the Court that the sentence pronounced against the said James Edward Drope, appellant herein, by the said Circuit Court of the City of St. Louis be executed, and that the marshal of this court arrest the said James Edward Drope without delay, wherever he may be found in this State, and deliver him to the Department of Corrections, Jefferson City, Missouri, to be confined in the appropriate penal institution for and during the period of his natural life, the same being the sentence passed by the said Circuit Court of the City of St. Louis. (Opinion filed.)

STATE OF MISSOURI—Sct.

I, MARION SPICER, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the November Session thereof, 1970, and on the 11th day of January 1971, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 11th day of January 1971.

/s/ Marion Spicer
MARION SPICER
Clerk

POSTCONVICTION PROCEEDINGS

[3]

IN THE CIRCUIT COURT OF THE
CITY OF ST. LOUIS

STATE OF MISSOURI

DIVISION 19

PERSONS IN CUSTODY

Case No. PCR 294

JAMES EDWARD DROPE
Prison Number 17695

VS.

STATE OF MISSOURI, RESPONDENT

* * * *

[4]

* * * *

MOTION TO VACATE JUDGMENT AND SENTENCE UNDER SUPREME COURT RULE 27.26

MOTION

1. Place of detention MISSOURI STATE PENITENTIARY—JEFFERSON CITY, MO.
2. Name and location of court which imposed sentence CIRCUIT COURT OF THE CITY OF SAINT LOUIS—ST. LOUIS, MISSOURI DIV. 19.
3. The case number and the offenses for which sentence was imposed: NO. C-13219 FORCIBLE RAPE & PRIOR CONVICTION OF A FELONY CAUSE NO. 405-R.

4. The date upon which sentence was imposed and the terms of the sentence: OCTOBER 21ST, 1969—NATURAL LIFE [5] IMPRISONMENT.
5. Check whether a finding of guilty was made:

   (a) After a plea of guilty _____
   (b) After a plea of not guilty YES.

6. Did you appeal from the judgment of conviction? YES.
7. If you answered "yes" to (6), list

   (a) the name of the court to which you appealed:

   SUPREME COURT OF MISSOURI
   UNITED STATES DISTRICT COURT—EASTERN DISTRICT OF MISSOURI, ST. LOUIS, MISSOURI.

   (b) the result in such court and the date of such result:

   MISSOURI SUPREME COURT AFFIRMED CONVICTION DISMISSED W/O PREJUDICE FOR FAILURE TO EXHAUST AVAILABLE STATE REMEDY (SEE DEFENDANT'S EX. A)

8. State concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence.

   (a) MOVANT'S RIGHTS UNDER THE PROVISIONS OF CHAPTER 552.020. 552.020 SUBD. 2. V.A.M.S. WERE VIOLATED BY THIS COURT.
   (b) MOVANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS GUARANTEED HIM BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

9. State concisely and in the same order the facts which [6] support each of the grounds set out in

(8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts:

(a) SEE SUPPLEMENTAL BRIEF ATTACHED HERETO.
(b) SEE SUPPLEMENTAL BRIEF ATTACHED HERETO.
(c) SEE SUPPLEMENTAL BRIEF ATTACHED HERETO.

10. Prior to this motion have you filed with respect to this conviction:

(a) Any motion to vacate judgment under Missouri Supreme Court Rule 27.26? NO
(b) Any petitions in state or federal courts for habeas corpus? YES
(c) Any petitions in the United States Supreme Court for certioran? NO
(d) Any other petitions, motions or applications in this or any other court? YES

11. If you answered "yes" to any part of (10), list with respect to each petition, motion or application.

(a) the specific nature thereof:

(b) the name and location of the court in which each was filed:

i UNITED STATES DISTRICT COURT—EASTERN DISTRICT—ST. LOUIS, MISSOURI
ii _____
iii ALSO APPEAL TO SUPREME COURT OF MISSOURI

[7] (c) the disposition thereof and the date of such disposition:

i DISMISSED W/O PREJUDICE FOR FAILURE TO EXHAUST AVAILABLE STATE REMEDY.
ii _____

iii CONVICTION AFFIRMED BY MISSOURI SUPREME COURT.

(d) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i UNITED STATES DISTRICT COURT ORDER ATTACHED HERETO AND MARKED EXHIBIT A.

12. Has any ground set forth in (8) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? NO

13. If you answered "yes" to (12) identify:

(a) which grounds have been previously presented:

i MOVANT'S RIGHTS VIOLATION UNDER CHAPTER 552

(b) the proceedings in which each ground was raised:

i FEDERAL HABEAS CORPUS—NOT RULED UPON BECAUSE FEDERAL COURT LACKED JURISDICTION.

14. If you have filed prior proceedings in any state or federal court involving this same sentence but did not raise therein one or more of the grounds you now list in (8), state which were not raised in the earlier proceedings and why they were not raised in those [8] proceedings:

(a) MOVANT'S RIGHTS VIOLATION UNDER CHAPTER 552

(b) INEFFECTIVE ASSISTANCE OF COUNSEL —SELF EXPLANATORY.

15. Were you represented by an attorney at any time during the course of:

(a) your preliminary hearing; YES
(b) your arraignment and plea? YES
(c) your trial, if any? YES
(d) your sentencing? YES

(e) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(f) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NO

16. If you answered "yes" to one or more parts of (15), list

(a) the name and address of each attorney who represented you:

i NAME UNKNOWN (PRELIMINARY HEARING)
ii LESTER WATSON—RICHMOND HEIGHTS, MO.

(b) the proceedings at which such attorney represented you

i PRELIMINARY HEARING
ii ALL OTHER PROCEEDINGS EXCEPT FEDERAL HABEAS CORPUS

(c) was said attorney

i appointed by the court? _____
[9] ii of your own choosing? YES

17. Are you now under sentence from any other court that you have not challenged? NO

18. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form)? YES

/s/ JAMES E. DROPE
Signature of Petitioner

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

I, JAMES EDWARD DROPE being duly sworn upon my oath, depose and say that I have subscribed to the foregoing petition; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this motion; and that the matters and allegations therein set forth are true.

/s/ JAMES E. DROPE
Signature of Affiant

Subscribed and sworn to before me this —— day of ——————————, 19 ——.

/s/ JOSEPH T. TEIN
Notary Public

FORMA PAUPERIS AFFIDAVIT

I, JAMES EDWARD DROPE, DO STATE THAT I AM WITHOUT FUNDS OR SECURITIES AND AM UNABLE TO PAY THE COSTS INCURRED IN [10] THIS MOTION TO VACATE JUDGMENT AND SENTENCE, AND AM UNABLE TO GIVE SECURITY THEREFOR, AND THAT I BELIEVE I HAVE A MERITORIOUS CAUSE OF ACTION.

/s/ JAMES E. DROPE
Signature of Petitioner

STATE OF MISSOURI)
) ss
COUNTY OF COLE)

I, JAMES EDWARD DROPE being first duly sworn upon my oath, depose and say that I have subscribed to the foregoing affidavit; that I know the contents thereof; and that the matters therein set forth are true.

/s/ JAMES E. DROPE
Signature of Affiant

Subscribed and sworn to before me this —— day of _____, 19 ——.

/s/ JOSEPH T. TEIN
Notary Public

* * * *

[30] * * * *

PROCEEDINGS

MR. WEISS: (Appointed Counsel for Movant) Your Honor, as our first witness we would like to call Dr. Joseph Shuman to the stand.

JOSEPH S. SHUMAN, of lawful age, a witness called by the movant, having been first duly sworn, was examined and testified as follows:

MR. WILLIAMS: Your Honor, the state would request that any other witnesses other than the defendant who are going to testify be excluded from the court.

THE COURT: All right. We have the rule of exclusion. All witnesses who are going to testify in the case will have to leave the courtroom.

DIRECT EXAMINATION

BY MR. WEISS:

Q Doctor, for the record, you have stated your name to the reporter as Dr. Joseph Shuman: is that correct?

A Yes, sir.

Q Where do you reside?

A I live in St. Louis County.

Q Do you have an office there?

A Yes.

[31] Q What is your profession, Doctor?

A I practice medicine, specializing in psychiatry.

Q You specialize in psychiatry?

A Yes.

Q How long have you been in the practice of psychiatry?

A Since 1952—'53. I'm sorry.

Q During all that time, have you practiced here in St. Louis?

A Yes.

Q What kind of educational background do you have, Doctor?

A I have a B.S. degree from college, M.D. from medical school. Following that a year of internship and three

years of residence in psychiatry. I am a diplomat of the American Board of Psychiatry and Neurology.

Q Doctor, at any time, if you can recall, did you examine James Edward Drope, the defendant sitting here at counsel table?

A Yes. I examined him on February 20, 1969.

Q Okay. How long a period did you get to talk to him or examine him?

A About an hour and a half.

Q Was that in your office, Doctor?

A Yes.

Q Doctor, did you subsequently make a written report of that examination?

A Yes, I did.

Q Did that report include your impressions that you obtained from that examination?

A Yes, it did.

Q Doctor, I'm going to hand you a document here and I want you to tell me whether or not that is a correct and true [32] copy of the report that you have just testified you made as a result of that examination of James Edward Drope?

A Yes. It appears to be similar to my copy. Exactly alike.

MR. WEISS: Could we have this marked as movant's exhibit B?

THE COURT: Is that the same?

MR. WEISS: It is in the record, Your Honor.

THE COURT: The record may reflect that a xerox copy of his report is in the file and apparently was filed at the same time there was a motion for a continuance on, it looks like, May the 27th, '69. Is that agreeable to counsel?

MR. WEISS: I think there was a motion filed.

THE COURT: A motion for a continuance.

MR. WEISS: A motion to continue this case in order that he might receive an examination, evaluation and the psychiatric treatment as suggested.

THE COURT: That was the grounds for the motion. I want the dates here. Is this right, May the 27th?

MR. WEISS: Yes, Your Honor. I think that's correct.

THE COURT: All right.

Q Doctor, let me ask you another question here. I'm going to show you a document that I have here which purports to be a copy of the report from St. John's Mercy Hospital dated 5/27/65—

[33] MR. WILLIAMS: Your Honor, I'm going to object to this unless a proper foundation is laid.

MR. WEISS: I haven't moved for its admittance yet.

MR. WILLIAMS: I will object to any statements made identifying that paper, because it is going into evidence, Your Honor, and I would certainly object.

THE COURT: Well, whether it is admissible or not the Court reserves its ruling. He may identify it or not. I don't know.

Q (By Mr. Weiss) Doctor, on one page it says here—

MR. WILLIAMS: I will object to anything that is said on that paper that is not in evidence, Your Honor.

THE COURT: Well, it is not in evidence yet, counsel.

MR. WEISS: No, it is not in evidence yet. I was asking for a interpretation of some of the language before I introduce it in evidence.

THE COURT: Well, at this point I don't know what it is. It's just a piece of paper. The objection will be sustained.

MR. WEISS: Your Honor, then I ask that this be admitted into evidence for the reason that I had written the medical records librarian, and a copy of my letter, a response from her to that letter and the attached St. John's Mercy Hospital official record—

MR. WILLIAMS: I would responsibly object, Your Honor, [34] as hearsay and no proper foundation has been laid for the admission of this evidence. And exchange of letters, Your Honor, is not the proper foundation that should be laid.

MR. WEISS: Your Honor, I think it is a proper rule of evidence to show that a reply letter can be admitted, establishing the authenticity, at least, of the requested material.

MR. WILLIAMS: It doesn't correct the hearsay that is involved, Your Honor.

MR. WEISS: Your Honor, I think that the hearing on Mr. Drope's trial, hospital records were admitted into evidence over the objection of hearsay made on the part of the defendant in that hearing.

MR. WILLIAMS: Your Honor, I respectfully submit that that which is already in the records speaks for itself.

THE COURT: Well, I am going to sustain the objection on several grounds. It doesn't show that that is the complete record to begin with and you will show it to counsel. I don't know what the materiality is. This is '61, isn't it, or '65?

MR. WEISS: This is 1965. These are copies. I have the originals in my file over there, if that is what you are sustaining the objection on, that these are copies.

THE COURT: Well, they are separate pieces of paper. It doesn't look like it is a complete record the way it is presented to the Court, so the objection will be sustained.

[35] MR. WEISS: Your Honor, I would like to make an offer of proof then, if I may.

THE COURT: All right.

MR. WEISS: Your Honor, I don't propose to prove anything by this, except the fact that there is a past history of mental disorder, at least, and that if at the time of the trial he would have been given a mental examination this eivdence would have been brought out. The evidence being, that in 1965, St. John's Mercy Hospital, the defendant was admitted for a severe injury of the back—

MR. WILLIAMS: Your Honor, I must respectfully object to this offer of proof.

THE COURT: He can make an offer of proof. It will be overruled. You may proceed.

MR. WILLIAMS: May I just complete my objection. He is doing by indirection what he cannot do directly.

THE COURT: It will be overruled.

MR. WEISS: And that report shows that at that time he had anxiety, hysteria, severe. Also, that he admitted a fear of surgery, such that a diagnosis was

made that he was psychoneurotic and anxiety hysteria, severe. Prognosis, poor. Also he was very manneurotic at this time, almost catatonic in behavior. Posture in rigid manner. Under these circumstances, the report goes on, the general type of behavior, I believe, it shows here he should have psychiatric evaluation [36] before surgery is contemplated.

THE COURT: What is the date of that?

MR. WEISS: It is dated 5/27/65.

MR. WILLIAMS: I object on the further grounds, Your Honor, that it is immaterial and remote from the event.

THE COURT: Well, he has made his offer of proof and I have sustained the objection. The main purpose of sustaining the objection is these are separated sheets of paper. I don't know what else is in it. It doesn't conform with the business records.

Q (By Mr. Weiss) Dr. Shuman, are you familiar with a doctor named Eli Robins?

A Yes, I am.

Q Who is he, Doctor?

A He is chairman and a professor of psychiatry, Washington University Medical School.

Q Are you also familiar with Edwin H. Schmidt?

A Yes.

Q Who is he, Doctor?

A He is a psychiatrist in private practice in St. Louis.

Q How about Patricia O'Neal, Dr. Patricia O'Neal?

A Also in private practice and I think also associated with the University of Washington.

Q From your knowledge in your profession of psychiatry, are all these competent psychiatrists?

A Yes.

Q Doctor, would you agree with the statement that I am [37] about to read to you that psychiatrically well persons never or rarely make suicide attempts, regardless of the severity of the social stresses to which they are subjected?

A That is a reasonable statement, yes.

Q Would you also agree with that statement—

MR. WILLIAMS: Your Honor, I'm going to object to these questions, because no proper hypothetical questions are being asked upon which the basis of the doctor's answers could be given.

MR. WEISS: Your Honor, I am just asking whether he agrees with the statements.

THE COURT: I am going to give counsel wide latitude. I don't think it meets the test requirements of the statute at all to set up the defense of mental incompetency, but I am going to give him wide latitude. I think really the objection is well taken, but I am going to give him wide latitude.

Q (By Mr. Weiss) Doctor, do you know whether or not these persons have ever made a study on attempted suicide?

MR. WILLIAMS: That will be objected to, Your Honor. It clearly calls for the operation of somebody else's mind.

THE COURT: If he knows. It may be an accepted fact in the field which they have reported. He may have participated. If he knows of his own personal knowledge, the objection will be overruled.

A Yes. There are many studies on suicide.

[38] Q Including these three persons?

A Yes.

Q Also are you familiar with a Dr. Wesnick a psychiatrist?

A I'm familiar with his name. He's in California, a special suicide study group.

Q He is in a special suicide study group in California?

A Yes.

Q Would you agree with this statement: Any person clearly about to commit suicide is in need of immediate and definitive treatment?

A Very much so.

Q Doctor, based upon your knowledge in the field of psychiatry, your educational and practical background, do you have an opinion as to whether or not a person who attempts a suicide, whether or not that act of attempted suicide would be reasonable cause to believe one

might not be mentally competent at that time to understand, say, the proceedings around him, if he was in the midst of a trial?

A This is a possibility.

Q It is a possibility. Why I'm asking you, would that be reasonable cause to still believe, that he might not be—

THE COURT: Well, pardon me. Let's proceed, counsellor. Let's don't engage in possibilities. I think he can say that if a man is accused of rape and committed, or murder, there is always a possibility he may be mentally sick, not only suicide.

Q I am asking, is there reasonable cause to believe [39] that though?

A There is reasonable cause.

MR. WEISS: I think that's all the questions I have of Dr. Shuman at this time.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, if a man were to invite four other men to go to his home and there he participated in rape and sodomy on his wife, and this man is in the midst of trial and four witnesses, including the principal witnesses, have testified to these acts, would a man in such a condition or could a man in such a condition deliberately and willingly and voluntarily shoot himself to present continuance of that trial?

A It's certainly a possibility.

Q Now, doctor, you examined this man on the 20th of February; is that correct?

A That's correct.

Q And is it not correct that on the 20th of February you found him to be in good physical health?

A Yes. I didn't do an actual physical examination. It was a simple exam.

Q You found him at that time to be free from psychosis?

A Yes.

Q You found him to be cooperative and responsive in your examination?

A Those are broad terms but he was fairly cooperative, but at times he wasn't very responsive. He was a very, very nervous man.

[40] Q Doctor, did you find him laboring under such a mental state of defect that he did not know that he was in your office?

A No.

Q In fact, you gave him some samples, medical samples; isn't that correct?

A Yes.

Q Why did you give him those medical samples?

A He was a very nervous man.

Q This was to settle his nervous condition?

A That's right.

Q The same type of medical samples that you give any other person with a nervous condition; is that correct?

A More or less.

Q You gave him an examination concerning his mental abilities; is that correct, doctor?

A That's correct.

Q You found him to be a man of low normal intelligence; is that correct, doctor?

A Very low normal. In fact, I later changed it to borderline.

Q You didn't say very low—

A In the next—

Q —in your report.

A In the next to last paragraph I called him a borderline mental deficient.

Q You also found that he could answer in judgment questions?

A That's correct.

Q He was able to answer judgment questions, but you [41] went further to stress, without trouble; isn't that correct?

A That's right.

Q At the time that you examined him, doctor, you feel that he needed to be institutionalized?

A By institutionalized, you mean could he use the services of a hospital?

Q Yes.

A I think he certainly could have used the services of a hospital.

Q In an in-patient way?

A Yes, sir.

Q You also said in this report that you felt that the medication that you or some doctor would give him would be such that he would be able to work efficiently? Didn't you say that in that report? I'm not sure. Where do you find that?

A I find it on page 3, second paragraph.

Q Thank you doctor. I only read it. You spoke with this man for an hour and a half; is that correct?

A Yes. When I wrote was I hoped it would help him.

Q Pardon me?

A When I wrote, I gave him the medication in the hope that it would relax him so he would be more efficient.

Q Now, doctor, this anxiety that Mr. Drope seems to have exhibited, I get the impression from your report that this anxiety was intensified because of this court case that was coming up?

A I felt that was certainly true.

[42] Q And you discussed the court proceedings with him?

A I don't think so.

Q You didn't?

A No.

Q How did he come to come to you, doctor?

A He was sent by his attorney. Hhe showed up with his wife.

Q You discussed the matter with his attorney?

A Yes.

Q And he requested a report from you?

A Yes, he did.

Q And at no place in this report did you relate that this man was under such a mental state of defect that he could not understand a court proceeding?

A That's correct.

Q And at no place in this report did you state this man was under such a mental defect that he could not aid and assist his counsel; isn't that correct?

A That's correct.

Q Is it not also correct, doctor, that at the time when you examined this man you felt that he was cooperative but he was of borderline intelligence, but could speak with his lawyer; isn't that correct?

A That's correct.

Q The fact of the matter is, in coming to your office he was following the advice of his lawyer; isn't that correct?

[43] A That's correct.

MR. WILLIAMS: No further questions.

THE COURT: Do we have this report? It is in the file, in the original case. This report that he is now referring to was filed in court. It is in the file.

MR. WILLIAMS: It was appended to Mr. Watson's motion.

THE COURT: Pardon me just a moment. And attached it to the motion for continuance, so it was before the court.

MR. WEISS: Yes.

THE COURT: It was before the judge in Division 16 and also the judge in Division 19 where the case was assigned for trial. I just wanted the record to show that. It is addressed to Mr. Weiss, the attorney for defendant, who arranged for the psychiatric examination—

THE WITNESS: Yes, sir.

THE COURT: —on behalf of his client. All right. Do you have any further questions?

MR. WEISS: Yes, I do, Your Honor.

REDIRECT EXAMINATION

BY MR. WEISS:

Q This report, doctor, was made by you February 22nd, it was dated; right?

A Yes.

Q And you had interviewed him on February the 20th?

A That's correct.

Q This was approximately one, two, three—four months [44] before he was tried; right?

A That's correct.

Q At this time, doctor, was there any evidence at all that you could have ascertained—if you had made the examination with the intent in mind of determining—whether he might be contemplating suicide?

A There was no evidence of suicide at that time.

Q No evidence that you saw at that time?

A No.

Q He was extremely nervous?

A Extremely so.

Q Now, doctor, our statute says that a mental disease or defect sufficient to give rise to a cause here where a man might not be able to understand the proceedings around him, does not mean any type of medical classification, but what it means is a type of mental disease—

MR. WILLIAMS: I will object to this. Calls for a conclusion of law which the doctor cannot make.

THE COURT: Well, that may or may not be, Mr. Williams, but I would like to have it explained to me, too. I sometimes wonder. But go ahead, counsel.

Q But it means merely a disorder sufficient to cause the results indicated. We are not talking about any mental disease or defect, psychotic or neurotic, but, in your opinion, a man who attempts a suicide, based on the hypothetical that Mr. Williams just gave you, he has been accused of taking four of his buddies home and raping his wife and standing trial [45] and actually goes to court for one day and hears testimony, comes home and makes an attempt on his life early the following morning. Would that give you reasonable cause, as a psychiatrist, to believe that he might have such a mind that it might not be able to allow him to proceed with the trial?

A Yes, that does give reasonable cause.

Q Doctor, did you prescribe any medication for Mr. Drope when you examined him on February the 20th?

A Yes, I did.

Q Generally what type of medication was that?

A It was a tranquilizer medication.

Q Did you give him a prescription along with it?
A Yes, I did.
Q Could it have been filled without getting a written order from you?
A No.
Q It could not be refilled without getting a written order?
A No.
Q The prescription you gave him, do you remember how much medication, how long it could have lasted?
A No, I don't.
Q In that report, as I understand it, it did recommend further psychiatric care; is that correct?
A Yes.
Q One of your conclusions was that he had a chronic anxiety reaction with depression. Could you explain a little [46] bit about what that means?
A That means the patient is markedly anxious and intense, not for one day but for a long period.
Q Psychiatrically speaking, a man in this condition, could his judgment be impaired in any way, could his reason be impaired?
A His reason I feel would be impaired. Are judgment and reason synonymous?
Q Only if you think they are.
A I think his judgment would certainly be affected by his condition. I guess that would be slightly impaired, but not completely impaired.
MR. WEISS: I think that is all the questions I have at this time, Your Honor.

RECROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, this report, you say in it somewhere that you didn't find that he was depressed in any way?
A I think in my final diagnosis I put down that I felt the depression was part of his problem.
Q In the earlier part of the report, doctor, you said he was not depressed?

A I think that is correct.

Q So at the beginning he was not depressed, but at the end he was depressed?

A I think I changed my mind about that.

[47] Q You changed your mind about that?

A Yes.

Q Now, doctor, if a person who has been on trial, as I have suggested earlier, were to shoot himself while his mother, brother are nearby, transported him to the hospital quickly, if this person while conscious were to tell a police officer "I shot myself because I didn't want to go to trial" would that make you think that that man was doing something that he did not know he was doing?

A It would not make me think that, no.

Q The fact of the matter is, you think that all of his faculties were about him; isn't that so, doctor?

A You say all—

Q Enough faculties to know why he was doing what he was doing?

A Not necessarily.

Q If he were to have told the policeman he did not want to attend the balance of that trial, and the fact of the matter is that he didn't attend the balance of that trial because of the wound he inflicted upon himself, would that not make you think, doctor, this was a man who was doing what he wanted to do and that he knowingly did what he did?

A I would have to go further than that and find out why he would think this in the first place—was he mentally ill in the first place, for example.

Q Well, on the 20th of February you spoke with him [48] for an hour; isn't that correct?

A About an hour and a half.

Q An hour and a half. You didn't think he was mentally ill on that day, did you?

A Yes.

Q Define mentally ill.

A He was certainly mentally ill on that date.

Q You say mentally ill. Define mentally ill.

A He did know where he was and he knew what he was doing. I think he was not psychotic.

Q He was not. The fact of the matter is, in the report you say he was not psychotic?

A Yes.

Q In fact, you go right on and say he was not suffering from any delusions, illusions, hallucination, obsessions, ideas of reference, compulsions or phobias at this time?

A That's correct.

Q Doctor, is it not true that we don't know the state of a person's mind who is going to commit suicide, because the person who commits a suicide does so and we don't know what caused him or her to do this act?

A You mean in general?

Q Yes.

A This is not true. This has been well researched. People who have made the suicide attempts have later been examined psychiatrically and they came up with many conclusions as to what their state of mind was at the time it happened.

[49] Q Of the attempt?

A Yes.

Q But those that complete the act, we don't know the state of their mind, do we?

A That's right. But when you say, you mean accomplished the act of killing themselves?

Q Yes.

A We have examined the ones who have tried it and didn't succeed.

Q But we don't know about those who have accomplished it?

A Obviously.

Q Because usually they go up on buildings, jump off, put a gun to their head and shoot themselves in the head?

A Yes. I have talked to two people who shot themselves in the head. There are different ways. Some drown themselves by jumping off a bridge.

Q A person who wants to kill himself, doctor, would shoot himself or herself in a vital spot, wouldn't they, if they really meant to do it?

A If they really meant to do it they would shoot themselves in what they consider to be a vital spot.

MR. WILLIAMS: I have nothing further.
MR. WEISS: Just a few questions.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Doctor, you said after you examined him he was in need of further psychiatric care; right?
A Yes.
[50] Q At that time you thought he was mentally ill?
A Yes.
Q Now, doctor, a man who was in such a state of mind that he couldn't understand the criminal and legal proceedings about him would not necessarily have to be sick, would he?
A That's correct.
Q He could be neurotic?
A Yes.
Q He could be suffering from such a mental state or mental condition that might go as far as psychotic.
THE COURT: And he might be ignorant and uneducated.
MR. WEISS: Yes.
THE COURT: Gentlemen, you both are engaging in so many possibilities where the Court knows that and has had testimony so many times that according to psychiatrists if a person commits murder or commits rape or robbery with a dangerous and deadly weapon, that in itself, according to the psychiatrists, calls for a psychiatric examination. Right?
MR. WEISS: That is our point, Your Honor.
THE COURT: Then we will have to have these psychiatric examinations on every man charged with a felony or with a rape, robbery, murder and this is the point these psychiatrists contend.
MR. WEISS: We are talking specifically here about suicide, Your Honor.
THE COURT: Well, that is begging the question.
[51] Let's proceed.
MR. WEISS: No further questions.
MR. WILLIAMS: Just one or two others.

RECROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, you haven't participated in any studies on suicide, have you?
A No.
Q None at all?
A No.
Q So what you are talking about here is what you heard or read somewhere?
A Yes.
Q You have no personal knowledge of it yourself at all?
A Except for persons on suicide attempts. I have examined people who have tried to commit suicide.
Q But you have made no study of this area?
A No.
MR. WILLIAMS: No further questions.
MR. WEISS: That's all the questions we have of this witness.
THE COURT: All right. You may step down.

(Witness excused)

MR. WEISS: I would like to call Miss Norma Snowden who is with the medical records department at City Hospital Number 1.
NORMA SNOWDEN, of lawful age, a witness called by the movant, having been first [52] duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q State your full name for the record, please.
A Norma Snowden.
Q Are you employed by the Medical Records Department of City Hospital Number 1?
A I am.
Q Are you here pursuant to a subpoena directed to the Medical Records Librarian at the City Hospital?

A Yes.

Q Did you bring with you a complete report of all the medical records and information on one James Edward Drope?

A Yes, I did.

Q Made at City Hospital Number 1?

A Yes.

Q Were these records made in the regular course of business at the hospital?

A Yes.

THE COURT: Show them to Mr. Williams so that he may admit for the purposes of saving time that they are the records of the hospital. Are those the records you have on this man, James Edward Drope?

THE WITNESS: Yes.

MR. WILLIAMS: Yes, Your Honor, they appear to be the records.

THE COURT: Without admitting any materiality or [53] relevancy as to any parts therein it is admitted by counsel to be the hospital records, kept in the regular course of business?

MR. WILLIAMS: Yes, Your Honor.

THE COURT: All right.

Q I would like to point out part of one of the documents in these records that we are referring to that you brought along with you. That is a consent to operations; is that right?

A Yes.

Q Now, is this normally, do you have someone normally sign this before someone is operated on at City Hospital?

A Yes.

Q A regular routine practice?

A Right.

Q Who usually signs that, do you know?

A The patient.

Q If the patient isn't able to sign that, who signs it then?

A The closest relative.

Q Now, would you read the signature on the consent to operation?

A Donald McCleary.

Q Would you look at the time and date that consent to operate was signed?

A June 25, '69, at 8:40 a.m.

Q I am also going to show you a page which is titled "Nurse's notes." Do you understand what that is?

A Yes.

[54] MR. WILLIAMS: Nurse's what?

MR. WEISS: Nurse's notes.

Q (By Mr. Weiss) How are these made?

A The shift of nurses on the floor make the notes at certain times.

Q Now, could you read the top line of this, what we are referring to as nurse's notes, please, and give the date and the time it was made?

A June the 25th, 1969, 12:50 p.m., admitted to division via stretcher.

Q Via stretcher?

A Placed in Room 308, unconscious. Blood pressure 110/60, pulse 68. J. Miller.

Q Would that be the nurse that made it, J. Miller?

A Yes.

Q Here is another nurse's notes here preceding that page you have just read off of, also seem to be dated 6/25/69; is that right?

A Yes.

Q Could you explain what that chart is, what it means?

A Well, this is the nurse's admission notes.

Q That is made on admission?

A Right.

Q Is there a check mark by "unconscious" there?

A There is.

Q Would that, in your opinion, mean that he was unconscious when he was brought into the hospital?

[55] A No.

MR. WILLIAMS: I didn't hear that.

Q (By Mr. Weiss) Would it necessarily mean that?

A No.

Q What would it be?

A He was unconscious when he made it to the floor.
Q When he made it to the floor he was unconscious. Could you explain to the Court, please, what you mean by made it to the floor?
A When the patient is first brought into the emergency room—
Q What is the location of that?
A That is on the ground floor. Then to OR.
Q That is the operating rooms; is that right?
A Yes.
Q Where is that located?
A Second floor. Then he goes to the floor.
Q Then he goes to the floor?
A Yes.
THE COURT: May I ask a question?
MR. WEISS: Yes, Your Honor.
THE COURT: Give me the time and the date of the admission and the time and date of discharge, please.
THE WITNESS: He was admitted on June 25th, 1969 at 8:35 a.m., discharged on June 26.
THE COURT: June the 26th?
[56] THE WITNESS: Yes.
THE COURT: What time?
MR. WEISS: Your Honor, I think that is correct because he was transferred to Homer Phillips Hospital.
THE WITNESS: Discharged from City Number 1.
MR. WEISS: Right. I think you will further find—
THE COURT: Pardon me, if you don't mind, counsellor, would you mind letting me ask a few questions, then you may correct anything you think needs correcting.
THE WITNESS: Discharged on June 26, 1969, 2:35 p.m., on the 26th.
THE COURT: 2:35 p.m. Do your records show that he went home or where he went or anything?
THE WITNESS: Yes, sir. He was transferred then to Homer G. Phillips Hospital.
THE COURT: On what date?
THE WITNESS: The 26th.
THE COURT: When was he discharged from Homer Phillips, do you know?
THE WITNESS: No, I don't.

MR. WEISS: Your Honor, I think I have something that may clear that up here. (handing document to the Court)

THE COURT: According to this, the date of discharge was July 15; is that right?

MR. WEISS: Yes.

[57] THE COURT: All right. I have no further questions. Thank you.

MR. WEISS: I have no further questions, Your Honor, except I would like to keep that here because we have another doctor out in the hall who may be able to testify as to some of those records.

THE COURT: Do you have any questions of this witness?

MR. WILLIAMS: I just want to finish reading this, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q On the afternoon of the 25th, counsel mentioned the chart showing that Mr. Drope was unconscious. This was after the operation; isn't that correct?

A Yes.

Q And he was still under the influence of the general anesthesia?

A Well, I couldn't tell.

Q Can you look at that and tell us whether or not he was anesthetized?

A It doesn't say.

Q Does it show that he was operated upon?

A Yes, he was, under general anesthesia.

Q Counsel also showed you a form that was signed by somebody else other than the patient; is that correct?

A Yes.

Q When one comes to a hospital with other relatives, [58] isn't it usual that before they work on a person that some close member of the family signs that sheet?

THE COURT: If you know now.

A As far as I know, the patient would sign it if he is able, and here there was two—I just noticed there's two operation consents and one is signed by him.

Q What did you just find in the record?

A There is two consents to operate.

Q One was signed—

A One was signed by James Drope and the other was signed by his stepfather.

Q Now, could you tell us when they were signed?

A The one signed by the stepfather was on the 25th of June at 8:40 a.m. and the one signed by James Drope was on 6/25 at 9:10 a.m. He was in the operating room when that one was signed.

Q May I see the one that he signed?

A Yes. (handing)

MR. WILLIAMS: I have nothing further.

MR. WEISS: Just a few questions, Your Honor.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Norma, the first one was signed at 8:40. That was by James Donald McCleary; is that right?

A Yes.

[59] Q There is also one signed by what appears to be James Edward Drope at 9:10 in the operating room; is that correct?

A Yes.

MR. WEISS: Your Honor, I would like to show you the character of that signature for your own observation.

MR. WILLIAMS: It appears to be written James Drope.

THE COURT: What is the point?

MR. WEISS: Well, Your Honor, I would like to compare that with the signature made earlier by him, also in the record.

THE COURT: The trouble with that is, what does that signature show me?

MR. WEISS: It proves, Your Honor, I would like to offer this as an offer of proof, whether it is accepted by

the Court or not, but it looks like it was written by someone who could barely move his hand and who could barely see. There is an X mark there and the scribbling down the page.

THE COURT: I can see that, but it may be due to his excited condition, it may be due to the position he was in when he was offered it to sign, there's a hundred and one things. Without the witness or without the parties there to testify the bare signature in itself hardly indicates anything, really. Does it, counsel?

MR. WEISS: Except it is evidence, I think cooperative [60] evidence of what the defendant may testify to later on.

THE COURT: All right.

MR. WEISS: Anyway, I think, if this is not already in evidence, I would like to offer the complete hospital record into evidence at this time.

MR. WILLIAMS: I have no objection to these records.

THE COURT: All right.

(Witness excused)

MR. WEISS: I know we started late. Could I have about a ten minute recess here to talk about a prospective witness who is out in the hall?

THE COURT: How many witnesses do you have?

MR. WEISS: I have got three more witnesses, Your Honor, in addition to the defendant, so that is four altogether.

THE COURT: Well, let's proceed now as soon as we can.

MR. WEISS: Your Honor, as our next witness I would like to call Mr. Jon Tek Lum.

JON TEK LUM, of lawful age, a witness called by the movant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q Dr. Lum, for the record, could you state your full name, please?

A Jon Tek Lum.

[61] THE COURT: How do you spell the last name?

THE WITNESS: L-u-m.

Q (By Mr. Weiss) Doctor, what is your present address?

A My present address is 9378 Olive Boulevard. That's my office. And my home is 142 Willowbrook Drive in St Louis. I also work at Malcolm Bliss Hospital.

Q Doctor, could you tell the Court your profession, please?

A I am a psychiatrist.

Q What is your education and background, please?

A I had pre-med education at Brown University for four years, Bachelor of Arts degree, then a four year education in medical school or M.D. at Tulane University in New Orleans I served a year of internship at Michael Ries Hospital and then a three year residency here at Washington University Department of Psychiatry in 1964 to 1967. Then I served as the chief of psychiatry at Langley Air Force Base in the Air Force for two years. Then after that I worked at Malcolm Bliss as the Director of Forensic Services since 1969.

Q Could you explain to the Court what your duties are and what is your job as Director of Forensic Services at Malcolm Bliss?

A At Malcolm Bliss we do the pre-trial examinations for defendants that are filing motions, usually under the 5.52 statute, for responsibility or to see whether they are competent to stand a trial. Also pre-evaluation to find out [62] if people are ready for discharge under the statute. We also examine the criminal sexual psychopaths and make evaluations on that aspect also.

Q In other words, doctor, you handle the proceedings under chapter 5.52 of the Missouri Revised Statutes; is that correct?

A That is correct.

Q For the Circuit Court of Criminal Causes in St. Louis?

A Yes, we do that.

Q And you are familiar with chapter 5.52 of the Missouri Revised Statutes; is that correct?

A Yes, I am.

Q In view of that chapter, doctor, you are called upon to make decisions whether a man is mentally competent to proceed with the trial; is that correct?

A That is correct. That is one of the requirements that we are asked to make in our report. There is a section of the 5.52 that outlines our examination when we make an examination for that and also criminal responsibility, and whether a man needs to be hospitalized.

Q Now, doctor, do you recall whether or not you personally or anyone under your charge examined James Edward Drope, the defendant sitting behind me at the counsel table while you were director of forensic services at Malcolm Bliss Hospital?

[63] A I do not recall that.

Q Doctor, do you have an opinion as to whether or not a person who has just attempted suicide during the course of his trial in which he has been accused of raping his own wife with four of his friends, whether or not he might be in need of psychiatric care?

A Yes, I do.

Q What is your opinion, doctor?

A I feel that a man that has committed an act such as raping his own wife, or allegedly raping his own wife, and then afterwards during the trial, in the process of the trial, makes a suicide attempt is in need of at least a psychiatric evaluation to find out his mental condition.

MR. WILLIAMS: That is objected to. It's clearly not responsive to the question.

THE COURT: The question was, was he in need of psychiatric care.

THE WITNESS: Well, I can't really state whether he needs psychiatric care. I think he needs to be evaluated to find out—

MR. WILLIAMS: I would object to anything past the first sentence and move it be stricken.

THE COURT: Well, I will overrule it. I thought he said he didn't know, but maybe he didn't. That is assuming he actually wanted to take his life.

[64] THE WITNESS: Well, the thing with psychiatry is you have to evaluate what you have. I couldn't make a definite answer to whether he needed treatment or

not. Some people may need treatment or he may need treatment, but you at least can examine a patient to find out if this is a necessity.

Q (By Mr. Weiss) Doctor, let me ask you this: With your familiarity with chapter 5.52 and under your duties as Director of Forensic Services and your work with the Circuit Court of Criminal Causes here, your interpretation of that chapter, do you think that in this instance where a man was accused of raping his wife with four of his buddies and attempted suicide during his trial, do you think that would be reasonable cause to believe that he might not have the mental capacity to proceed with the trial?

MR. WILLIAMS: That is objected to. It calls for a conclusion of law.

THE COURT: Yes but it will be sustained.

MR. WEISS: Your Honor, this is a man that works for the state—

THE COURT: Pardon me. The courts and the statutes and the law have not completely surrendered their power to psychiatry. Maybe we should. but we haven't.

MR. WEISS: I'm asking for his opinion though, and the chapter under—

THE COURT: Well, you used the terminology, you [65] referred to in the statute. There are two sections in the statute, one that refers to whether or not a person is free of responsibility and the other as to whether or not he is fit to go to trial and cooperate with counsel. Now, what does he mean by cooperate with counsel? To what extent was he to cooperate with counsel? This man did, I assume, cooperate with counsel at least for a while. He did consult with Mr. Watson, he was out on bond, he was examined by a psychiatrist that very February. These are all things that he is going to have to take into consideration, and not to just a mere conclusion, sitting there on the stand and telling the court and the Judge that you ought to have had a psychiatric evaluation but you can ask him his opinion, but you have to make a more reasonable basis, because in any case where we try a man and he inflicts an injury on himself we would have to stop proceedings. As the

Supreme Court stated, it is entirely up to him. You are assuming that he actually tried to kill himself here. There is another assumption. I don't know whether he did or he didn't so far. All right. You may proceed.

MR. WEISS: All right, Your Honor.

THE COURT: The only thing is, I am sustaining the objection because you are asking for a conclusion of law and for this psychiatrist to substitute his judgment for the Court. You are going to have to lay more of a foundation to [66] get his opinion without just referring to the statute broadly. All right. Let's proceed.

Q (By Mr. Weiss) Let me ask you this, doctor: Did you read a report made by Dr. Shuman of February 22?

A Yes, I did.

Q Dr. Lum, I also showed you a report, an official city record of City Hospital here.

A Yes, sir.

Q Did you read part of that?

A Yes, I did.

Q Did you find any evidence in there that the man had a history of mental trouble?

A Yes, I did. Actually, it was interesting, that I examined the defendant sometime in 1965. I wasn't aware of this until today when you refreshed my memory that as a psychiatrist resident we did a psychiatric consultation at that time and did find that he did have some psychiatric problems and was in need of psychiatric care and treatments.

Q In view of this background, doctor, in view of the fact that this man attempted to rape his wife, he has been accused of that I believe, along with four of his buddies, in view of the fact that that examination took place on February 20, the report was made February 22 by Dr. Shuman, in view of the fact that he did have counsel, without any facts in the record now that he consulted with counsel or the extent [67] of that consultation, that he went to trial on June the 23rd, and on the early morning of June 25th he was found shot in the stomach, apparently the weapon being a .22 caliber rifle, laying close by. On the basis of this back-

ground and this information and under your interpretation of the statute, do you think that there is reasonable cause to believe that he might not have been fit to proceed with his trial?

MR. WILLIAMS: It is objected to, Your Honor.

THE COURT: It will be sustained.

Q (By Mr. Weiss) Without your interpretation of the statute, in your opinion as a psychiatrist, doctor, without any legal reason at all or without any statutory language, do you believe there is a reasonable cause to believe that this man had a mental condition so that he could not intelligently have proceeded with his trial, consulted with his counsel and understood the proceedings around him?

A I have an opinion. I think if a man makes a suicide attempt on his life, shooting himself in the abdomen, I think this is a serious psychiatric indication that the man has a problem and needs to consult with a psychiatrist or should see a psychiatrist. On that basis, people that make suicide attempts, some eighty-five per cent of them have a true psychiatric disorder. Dr. Robins and some of the other people at Washington University found that a lot of these people do in fact suffer from a psychiatric illness [68] and show poor judgment. This suicide attempt, it does indicate poor insight and judgment. They also may have some distortions or irrational thinking, they may be severely depressed, and for these reasons, they should seek the help of a psychiatrist.

Q Now, doctor, we don't know whether he was mentally incompetent or not without an examination; is that correct?

A That is correct. I couldn't conjecture as to whether he was competent to assist in his own defense.

Q These factors in your mind would be a reasonable cause to believe that there might be something that would warrant a psychiatric examination—

A Yes.

Q —to make the determination whether or not he was mentally competent to understand the proceedings around him and cooperate with his counsel?

A I would feel that it would be prudent or wise to make a evaluation at that time, because one doesn't really know his condition but it could be that he had various causes for taking his life, but whether it was due to a true psychiatric disorder or something else we really don't know until an evalaution is made and one would have to try and determine whether he was acting irrationally at that time.

Q If he was acting under a mental disorder that caused him to make this suicide attempt on his life, he might [69] not have done it, so called intentially or wilfully with complete control of all his faculties; is that correct?

A That is correct.

Q There could be a lot of, say, subsconscious thought about this in terms of trying to save his life or somehow getting out of the particular stress he was in.

A We really don't know this until one examines the patient and goes into it in further detail, but at least I think he should be evaluated to find out whether he could—whether he knew the proceedings against him or cooperate with his counsel.

MR. WEISS: That's all the questions I have at this time, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Doctor, the word suicide is a conclusion that is being made here, isn't it, someone that shoots himself saying he was trying to kill himself; is that correct? That is a conclusion that has been made, isn't that so?

A Well, it depends on how far you take an act such as this. You could say a person that has a gunshot wound of the abdomen that was self-inflicted. Now, whether you equate this as a suicide attempt or not, I think as a psychiatrist I would say that was a suicide attempt. That would be my opinion or conclusion.

[70] Q Now, doctor, if the man that did such a thing were to have told a policeman while at the hospital "I

shot myself because I did not want to continue with the trial" would this indicate to you as a psychiatrist that this was a man that committed an act knowingly?

A Well, it may mean that he had some thought about the trial and the stress that he was under and may give you a superficial explanation of why he did this, but it may not go into the complete details of whether the man was depressed at that time, whether he was suffering from a psychiatric disorder at that time or whether he was just doing this as a way out of the trial. I don't think you really know, just on that verbatim statement. There are a lot of other things one would have to go into, such a finding out the man's previous psychiatric history, whether he had in fact seen a psychiatrist, whether he was nervous during his life or whether he had periods of depression or whether he had ever seriously thought of making a suicide attempt when he was under stress. A lot of these things would have to come in, be brought up in an examination to find out whether he was, say, malingering or did it intentionally or if it was due to a true psychiatric disorder.

Q So are you saying, doctor, that if a man was on trial for having participated in a rape of his wife and he has told people before he committed the act, told people [71] after he committed the act of shooting himself, that he did it for the reason that he did not want to continue with the trial, that you would not know whether or not such a person was sane or insane or labored under a mental defect?

A We wouldn't know this until one has examined the defendant, because many times people make certain statements about themselves and it could be a superficial evaluation of why they did it, but we don't know the full psychiatric impact of such a statement.

Q Let me ask you this, doctor: If a man were to say to you that he was going to shoot himself and did shoot himself, would you not be able to determine his intent at the time now when he said that he was going to shoot himself?

A To what extent of intent are we talking about?

Q If a man says he is going to shoot himself, do we know he intended to do it at the time he said it if later on he shoots himself?

A I think it depends on his state of mind. Suppose he were delusional at that time and then later he cleared up. We don't know whether he really intended to do this or whether he was acting under his full capacity, his mental capacity.

Q Well, doctor, do we know at any one given time whether or not any human being is operating under his full mental capacity?

[72] A I think a lot of this would deepnd on an examination. Maybe we are supposedly expert in this field, to determine a man's rational capacity, whether he has the rationale to know that he is in full control of his own faculties, but whether he can make a rational judgment or say he was laboring under a lot of stress and pressures, say, like in this particular for instance in the trial where he did an irrational act, why was his judgment so poor, why did he take this way out? We don't know all the answers.

Q If he told you why he did, would you believe him?

A I think I would believe him if I had examined him and sat down and did a very through psychiatric examination.

Q Doctor, you say that you did psychiatrically examine Mr. Drope some while back?

A That's correct.

Q Is that reflected in the hospital medical records?

A Yes, sir, it is.

Q Can you pick it out for us? Did you write this, doctor?

A Yes, I did.

Q Well, would you read it to us? I can't read it.

A Apparently I saw him on July 15, 1965 as a psychiatric consultation and he had a chief complaint of having some pain out of proportion to his physical findings. Usually we go to referral, say, from the neurological service of the hospital and apparently he had a severe upset of low back pain after [73] he had pushed a car one day prior to the time he was admitted and there were—

Q Let me stop you at that point, doctor. According to that report, he had pushed a car one day before you saw him and he had low back pain and that gave you to believe something was psychiatrically wrong with him?

A No. What I'm saying, he was admitted to the City Hospital, apparently earlier than that. I would have to refer—

Q This is in your handwriting, is it not, doctor?

A Let me explain how we get a referral. When I was a psychiatric resident at City Hospital, people come into the neurological service. Apparently he came in for a pain in his back and the neurological specialist examined him and found that the pain was out of proportion of the laboratory studies and the physical diagnosis, so they thought perhaps he did have a psychiatric disorder, so they called in a psychiatrist to come in and examine the patient.

Q Was that you?

A That was me.

Q Did you examine him?

A Yes.

Q What was your finding?

A My findings, I said here, the impression was a conversion reaction with compensation factors considered and there was not any organic basis for the low back pain. The etiology was unknown but I also have, a character disorder, [74] sociopathic personality. It was my recommendation that—

Q How long did you talk to him at that time, doctor, to determine all of that?

A I can't really recall but it must have taken at least an hour or longer, because I wrote—this is a long report.

Q What is character conversion, doctor?

A Well, there are two or three diagnosis here. I said a conversion reaction. A conversion reaction is where a person may have some unexplained pain which cannot be shown through some physical findings, and it may be due to psychological psychiatric factors. A character disorder is a type of disorder that is a psychiatric diagnosis for a certain particular personality, psychiatric personality. It is also interesting to note

that I advised the patient be followed up or seen in the Malcolm Bliss psychiatric clinic and did prescribe a tranquilizer for him.

Q You found no psychosis, however, did you?

A No, I did not find any psychosis at that time.

Q Did it not find at that time that he was laboring under any such mental defect that he did not know where he was and what he was doing, did you?

A Well, if you want to ask that particular question, he was oriented at that time.

Q He was oriented?

A Right.

[75] Q Doctor, what does that mean?

A He knew who he was, where he was and what time it was.

Q You were able to speak to him and he was able to answer you?

A Yes.

Q You were able to communicate with each other?

A Yes.

Q Based on conversations you had with him and he had with you, you came to the conclusions you have in there; is that right, doctor?

A That's right.

MR. WILLIAMS: Nothing further.

MR. WEISS: Just a few questions—

MR. WILLIAMS: Oh, I forgot something.

Q (By Mr. Williams) Doctor, you said something about eighty-five per cent of the persons that attempt a suicide—what hapepns to the fifteen per cent?

A The other fifteen per cent are made up of other psychiatric disorders.

Q Well, you said that eighty-five per cent had psychiatric disorders. You said nothing at all about the fifteen per cent. Are you saying now one hundred per cent?

A I am saying that a lot of people make suicide attempts and eighty-five percent of them have, say, a chronic depressive illness or alcoholism, the others are made up of character disorders, schizophrenics, organic [76] brain syndromes and such as that.

Q You have known peolpe to deliberately do acts against themselves and not have any psychiatric problems, haven't you?

A I think this is just by the very nature that someone made a suicide attempt, for me, to me as a psychiatrist, I would say that they have some type of problem.

Q Doctor, do—

A Taking one's life or making an attempt on one's life to kill someone, to kill himself, I believe is a serious type of psychiatric problem.

Q Now, if this person were deliberately doing this and not to kill himself but to promote a result that they wanted, would you say that that is a psychiatric problem?

A Sure. It's just like, say, in this particular incidence, if a guy had low back pain and he were getting some compensation for it, even though you may know maybe he was trying to get the few extra bucks, he could, in fact be suffering from a psychiatric disorder. We don't know, just because a man may want to stop a trial, we don't know to what extent he was trying to do this, whether it was just a face-saving device or whether he really was severely depressed, under large strain, whether he was under a lot of pressure and things like that. We just don't know. I didn't examine the patient at that particular time, so I can't make any conclusion like that.

[77] Q Doctor, you said earlier if a person who had low back pain was trying to collect some money, are you saying that people deliberately do acts to themselves so they can collect insurance money and that type of thing?

A In compensation neuroses or a lot of things like this, people may have certain types of pains or aches over and above, say, what is found physically. Now, whether the guy is deliberately and wilfully doing this, I don't really know or care but as a psychiatrist I think, I say something is wrong with this guy, that he is taking this particular method of expressing his problem.

Q Well, doctor, would you say that a person who is in the midst of a trial with all of the evidence going

against him and everyone pointing his finger at him, that he would be in an emotional upset condition?

A I would say he certainly would be under a lot of pressures and—

Q Are you saying that under such pressure he might have the mental faculties to do something to relieve that pressure? Is that what you are saying?

A I am saying it is quite likely that apparently this man was under a lot of emotional upset and pressures and did something. Now, why he did it I am not making an evaluation, because I don't know all the circumstances. I didn't see the patient.

[78] Q Well, doctor, if you had seen him at the time that he was shot and he would have told you, given you all the circumstances that we have, that he had shot himself because he did not want to continue with that trial, what would your opinion be?

A I would have no opinion because—

Q You have no opinion?

A Because of the fact that I didn't see the patient, I didn't ask him the questions that I would ask him. One of the things I would ask whether he did in fact have a psychiatric disorder. There are certain parts of our mental examination that we go into very thoroughly to find out whether the person has a psychiatric problem or not.

Q Doctor, in making evaluations, as you have done at Malcolm Bliss, have you ever made evaluations that have come to court and the judge has overruled your evaluation and found that the man was competent to stand trial?

A No. Actually, the cases that I made evaluations on in terms of competency, the judge went along or went with our decision.

Q You say "went with our decision". Was there more than one person making the decision?

A I make the evaluation and it is up to the court to decide whether a man is competent to stand trial.

Q You said "we". Do you make that in conjunction with [79] some other psychiatrist or do you make it alone?

A I have made it alone. I have had some psychiatric consultation.

THE COURT: Sometimes you have the staff do it?

THE WITNESS: Yes.

MR. WILLIAMS: No further questions.

THE COURT: All right. Do you have further questions?

REDIRECT EXAMINATION

BY MR. WEISS:

Q Doctor, a man would not necessarily have to be psychotic to render his mental condition as such that he might not understand the proceedings around him and be able to cooperate with counsel or assist in his defense, would he?

A That's correct.

Q Pardon?

A That is correct. Actually, the statutes are fairly specific in terms of that, fitness to proceed, and I think they do outline, if a man knows the proceedings against him or is able to assist his own counsel. Apparently there is a line of discussion as to what requirements are needed in terms of assisting with his counsel, whether this has to be a rational man or irrational man or to what extent.

Q Given the facts in this case, assuming that a man in this type of trial has made an attempt on his own life, there would be reasonable cause to believe, would there not, [80] whether he might not be mentally fit to proceed?

A I think one would have to examine a patient like that to find out whether or not he was fit to stand trial or proceed.

Q So your testimony is there would have to be a thorough evaluation made to answer that question absolutely?

A Yes.

Q But there would be reasonable cause to show that an examination should be made?

A I think—

MR. WILLIAMS: Of course, that is objected to.

THE COURT: That has been asked a half dozen times anyway. It's repetitious. Let's proceed.

MR. WILLIAMS: I have a continuing objection to it.

THE COURT: How long would this examination take?

THE WITNESS: Usually your examinations don't take very long.

THE COURT: How long? A week? Two days, ten days?

THE WITNESS: People that we have had at Malcolm Bliss, sometimes it takes a week, sometimes a month or so.

THE COURT: All right. Thank you.

MR. WEISS: That's all the questions I have.

(The witness was excused.)

HOMER ELMER CASE, JR. of lawful age, the witness called by the movant, having been [81] first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q What is your full name?

A Homer Elmer Case, Junior.

Q How old are you, Homer?

A Nineteen.

Q Where do you reside now?

A 5220 Bulwar.

Q Is that in the city of St. Louis?

A Yes, sir.

Q Homer, are you married?

A Yes, sir.

Q Do you have any children?

A Two.

Q What is your occupation?

A I am a crossing watchman for the Norfolk and Western Railroad.

Q Homer, are you related in any way to James Edward Drope, seated here at counsel table in the courtroom today?

A Yes, sir.

Q What is your relation to him?

A Half-brother.

Q He is your half-brother?

A Yes, sir.

Q On what side? Do you have the same mother?

A Same mother.

Q Okay. Homer, how long have you known James?

A All my life.

Q Did you ever reside with him?

A Yes, sir.

Q Between what period of time did you reside with him?

A Well, I started staying with him, I think, it was [82] '64—

Q Speak a little louder.

A I started staying off and on with him, I think it was back in '64.

Q Until what time?

A '69.

Q At that time was he married?

A Yes, sir.

Q Was he living with his wife?

A Yes, sir.

Q Who was his wife?

A Mary Ann.

Q Mary Ann was his wife. Do you know whether he had any children?

A Yes. They had four at that time.

Q They had four children during the time that you lived off and on with him?

A Yes.

Q How many do they have now, do you know?

A Five.

Q Homer, on the morning of June 23, 1969, where were you?

A Is that the day the shooting took place?

Q I'm sorry. On the date of June 25, 1969, where were you? That was the day the shooting took place.
A I was at home.
Q You were at home, at the address that you gave?
A No. I lived at 5238 Bulwar.
Q 5238 Bulwar, is that right?
A Yes, sir.
Q Were you married at that time?
A Yes, sir.
Q Did you have any children at that time?
A One.
[83] Q On that morning, while you were at home, did anybody subsequently come to your house?
A Yes.
Q Who came to your house?
A Well, my brother, my stepfather, my mother, and Mr. McCleary.
Q Who is Mr. McCleary?
A Well, he is my ex-stepfather.
Q Okay. Was there anyone else in the house besides these people you just named?
A Yes. There was my wife, my little daughter and my brother's five children.
Q Your brother's five kids were at your house?
A Yes, sir.
Q How long had they been at your house?
A I believe it was about a week or two.
Q Do you know what they were doing at your house, or the reason why they were at your house?
A Yes.

MR. WILLIAMS: That is objected to, Your Honor, as being immaterial.

THE COURT: What is the purpose of this?

MR. WEISS: I think, Your Honor, we want to establish the scene where this attempt on his life took place.

THE COURT: Well, wasn't that done after the trial motion?

MR. WEISS: Your Honor, Mr. Case never did testify.

THE COURT: No, but you may want to bring in the [84] kids. They didn't testify either. I thought we went into what happened there.

MR. WEISS: Your Honor, one of the grounds that we have here is ineffective assistance of counsel. We don't think that counsel ever did talk with Mr. Case here or any of the other relatives at the time of that shooting. It was never presented before this court and I want to establish number one, that there was ineffective assistance of counsel because the facts we can bring out now should have been brought out that he—

THE COURT: Let's don't go on that basis. Perhaps he didn't talk to Mr. Watson, but he did produce some evidence. Let's proceed now.

Q Homer, on that morning, do you recall anything unusual happening?

A Yes. My brother was shot.

Q Your brother was shot?

A Yes.

Q When was the first thing that you heard or knew anything about his being shot?

A Well, Mr. McCleary came in the house and I was still in bed at the time, he came in the house and he said James was laying in back—

MR. WILLIAMS: I'm going to object to anything that was said by somebody else, Your Honor.

THE COURT: Sustained.

Q What happened? Did you see James laying out in back?

A Well, after I heard that James was laying out in [85] back, I went out there and I seen him laying out there.

Q At that time was he moving in any way?

A No, sir.

Q Was he able to speak?

A No, sir.

MR. WILLIAMS: That is objected to. It calls for the operation of his mind.

THE COURT: Well, he can tell whether he was laying there and whether he tried to speak to him and whether he got any response. Let's proceed.

Q Did you try to speak to him?

A Yes, sir.

Q Did he make any response to you?

A Well, he wasn't talking.

Q He did not talk?

A No.

Q You found him out there, laying there. How was he laying, describe the position he was in.

A He was just laying forward, stretched out more like he had been crawling.

Q Was he bleeding?

A Yes, sir.

Q What did you see when you observed him?

A Well, when I observed him I just saw him, then when I turned him over I seen his stomach was all blood, down the front of his pants here was blood and everything.

Q What did you do at this time?

A Well, me and McCleary picked him up, took him to the car and took him to the hospital.

[86] Q Took him in your car?

A Yes, sir.

Q Drove him to what hospital?

A City Hospital Number 1.

Q I'm going to show you a street map of the city of St. Louis that I have here, Homer. Would you point out to the court where Bulwar Street is on here?

A Well, right here (indicating).

Q Is that by Bellefontaine Cemetery—

THE COURT: Pardon me just a second.

MR. WILLIAMS: I object.

THE COURT: Just a minute. Is it up there just east of Broadway?

THE WITNESS: Yes—west of Broadway.

THE COURT: Up near Calvary Cemetery?

THE WITNESS: Yes.

THE COURT: I know the neighborhood.

Q Okay. And you drove him from Bulwar down to City Hospital Number 1; is that correct.

A Yes, sir.

Q Mr. Cleary was with you?

A Yes, sir.

Q At the time when you were driving him down there, did you attempt to speak to him?

A No, sir.

Q Did he in turn make any response to you?

A No, sir.

[87] Q What did his condition, physical state appear to you to be?

A Dead.

Q He appeared to be dead?

A Yes, sir.

Q Now, when you got him down to City Hospital Number 1, what did you do then?

A Well, when I got him there I pulled into emergency and I went in and I got this cart and then we put him on the cart.

Q Who got the cart?

A Well, I went in there and got the cart guy, he came out with the cart.

Q Did you help put him on the cart?

A Yes, sir.

Q Then where did he go to?

A Well, he was there in the lobby for a few minutes and then they took him into the emergeney room.

Q Were you able to go into the emergency room?

A I went to the door. Not all the way in.

Q Did you wait there?

A Yes, sir—well, I had to go to the clerk's desk.

Q In relation to the emergency room, where was the clerk's desk?

A Well, it was right just like from me and that prosecutor sitting there.

Q About from you to the prosecutor?

A Yes, sir.

Q Were you able to observe the emergency room while you were at the clerk's desk?

A Yes, sir.

[88] Q Now, Homer, at any time while you were there at the hospital, the emergency room and the clerk's desk, did you see any policemen?

A No, sir.

Q Did you talk to any policemen?

A No, sir.

Q Did any policeman talk to you?

A No, sir.

Q Now, Homer, how long did you remain at the hospital that day?

A I believe it was about 6:00 o'clock that evening.

Q Did anybody else from your family come down to the hospital that day?

A My mother and my step-father did.

Q Was Mr. McCleary also with you until 6:00 o'clock?

A Yes, sir.

Q After you left the clerk's desk, where did you go then?

A Well, I went back to the door.

Q The door of what?

A To the emergency room.

Q Okay.

A And then they brought James out, then went down the hall and I went down with them down the hall and got the elevator, then me and Mr. McCleary got up on the elevator, went to the operating room. We got off the floor at the operating room with them, with the doctors and my brother, and then after we got off on the floor and they started in the operating room they said we couldn't go no further.

[89] Q Couldn't go in the operating room?

A No.

Q Then where did you wait?

A We went downstairs to the lobby. From there we went back to three West, I believe is where he was at, back and forth, until we got—

Q Did you see James later on that day after he was brought out of the operating room?

A Yes, sir. I seen him when he got out of the elevator.

Q Did you try to talk to him?

A Yes, sir.

Q Was he able to talk to you?

A No, sir.

Q At any time, from the time you found him laying there in the back of your house and when you left the hospital at 6:00 o'clock, were you able to talk to James?

A No.

Q Did he talk to you?

A No, sir.

Q Did you talk to any policemen on the day of the 25th?

A No, sir.

Q Homer, what is your opinion—you have driven from Bulwar to City Hospital a number of times?

A Yes, sir.

Q You lived in the city of St. Louis how long?

A Off and on, all my life.

Q What time of the morning do you remember it was when you drove James down to the hospital?

[90] A I don't know exactly, but I believe it was somewhere around 8:00 o'clock.

Q Did it appear to be in the rush hour?

A Yes, sir.

Q How long would it take a normal person to get from Bulwar down to City Hospital driving normally?

A Fifteen to twenty minutes.

MR. WEISS: That's all.

THE COURT: Do you have any questions?

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Homer, the defendant here is your brother; isn't that correct?

A Half-brother.

Q Half-brother. Okay. You want to help him as much as you can, don't you?

A In a legal way.

Q In a legal way. That's why you are here today, isn't that so?

A Yes.

Q Now, did you attend any of the days of your brother's trial?

A No, sir.

Q The night before the shooting did you speak with your brother either in person or on the telephone?

A Yes, I spoke with him in person.

Q He told you he was coming over to the house, didn't he?

A Yes.

Q He told you how the trial was going, didn't he?

[91] A Yes.

MR. WILLIAMS: Nothing further.

MR. WEISS: Just a few more questions.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Homer, do you know Mr. Lester Watson?

A Briefly.

Q Briefly. How many times have you spoken to Mr. Watson before the trial?

A Before the trial? Never.

Q Never spoke to him. Did Mr. Watson ever call you?

A No. I left messages but he never did call.

Q Have you attempted to speak to Mr. Watson?

A Yes, sir.

Q Had you left messages at his office?

A Yes, sir.

Q Did he ever call you back?

A No, sir.

Q At the time James was shot, that morning, during that day, did you speak to Mr. Watson?

A No, sir.

Q Didn't Mr. Watson attempt to call you, to your knowledge?

MR. WILLIAMS: That's objected to.

A No.

MR. WEISS: That's all, Your Honor.

[92] MR. WILLIAMS: This whole business, the whole relationship between this witness and Mr. Watson would be totally irrelevant.

THE COURT: All right. The answer may stand. You may step down.

(Witness excused.)

JAMES McCLEARY, of lawful age, the witness called by the movant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q Mr. McCleary, state your full name, loud and clear, please.

A James McCleary.

Q Mr. McCleary, are you related in any way to James Drope?

A Ex-stepfather.

Q You were married to his mother at one time?

A Yes, sir.

Q Mr. McCleary, taking you back to the morning of July 25, 1969, at a time—we are talking about an incident where James Edward Drope was found outside his brother Homer's house, shot. Do you remember that morning?

A Yes, sir.

Q Did you see him laying out there that morning in the backyard?

A Yes, sir.

Q At that time was he able to speak to you?

[93] A No, sir.

Q Did you along with Homer Case transport him down to City Hospital Number 1?

A Yes, sir.

Q Along the way, did James Drope say anything to you?

A No, sir.

Q What was his condition? What did his physical condition to you appear as?

A He was shot.

Q When you got to the hospital, were you with him?

A Yes, sir.

Q Were you with him when they took him into the hospital?

A Yes, sir.

Q Were you with Homer Case also?

A Yes, sir.
Q Now, when you got to the hospital did anybody ask you to sign a piece of paper?
A The doctor.
Q A doctor asked you to sign something?
A Yes.
Q Was this the consent to have James operated on?
A Yes, sir.
Q Pardon?
A Yes, sir.
Q Okay. Now, at the hospital did you see any policemen talking to him?
A No, sir.
Q Did you see any policemen?
A No, sir.
Q Did any policeman talk to you?
A No, sir.
Q Did you talk to any policeman?
A No, sir.
[94] MR. WEISS: That's all the questions I have, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. McCleary, did you attend Mr. Drope's trial?
A I was there.
Q You were at the trial?
A I was there, yes.
Q The evening before the shooting, did you discuss the trial with the defendant?
A No, sir.
Q You didn't talk about the trial with him?
A No.
Q The next morning, the morning of the shooting, you went over to Mr. Case's house?
A Yes, sir.
Q Did you go there with anyone?
A No, sir.
Q You went to Mr. Case's house by yourself?
A Yes, sir.
Q You didn't go with your wife?

A No.

Q You didn't go with James Drope?

A I don't think so.

Q Pardon me? I didn't hear you, sir.

A I don't think so.

Q Would it refresh your recollection if I were to tell you that Homer Case testified that you, your wife and James Drope came there to his house together?

A No.

[95] Q You are just testifying here because you want to help James. Isn't that so?

MR. WEISS: I object to that, Your Honor. Of course he wants to help. That's why any witness testifies.

THE COURT: As to the form of the question the objection will be sustained.

Q Now, Mr. McCleary, the morning of June 25, did you know that there was a gun in the garage?

A I sure didn't.

Q Pardon me?

A No, sir.

Q You didn't know there was a gun in the garage?

A No, sir.

Q Did you see a gun that morning?

THE COURT: Speak up.

A Yes, sir.

Q Where did you see the gun?

A In the garage.

Q In the garage?

A Yes.

Q When was the first time you saw the gun in the garage?

A The only time I seen it.

Q What?

A That's the only time I seen it.

THE COURT. Speak up.

THE WITNESS: It's the only time I seen it.

Q Now, when for the first time that morning did you see your wife?

MR. WEISS: I think we want to make the record clear, [96] Your Honor. He was not married to James' mother at the time.

Q At the time of this event, were you married to James Drope's mother?

A No.

Q No? When, that morning, for the first time did you see James Drope's mother?

A I don't know.

Q You don't know?

MR. WEISS: Just answer the questions as you recall it, Mr. McCleary. Just answer it as you remember what happened that morning.

THE WITNESS: No, I don't.

Q You don't know. Now, the morning before that, had you gone to court with James Drope's mother?

A No, sir.

Q No? Do you remember testifying here earlier when I asked you whether or not you had gone to court in this case when it was on trial you said yes? Was his mother there?

A No, sir.

Q Pardon me?

A I don't remember.

Q You don't remember. But you do remember quite well that at the hospital, City Hospital Number 1, on that morning you did not see a policeman?

A No.

Q Did you see a policeman that afternoon?

A Later in the day.

Q Later that day you saw a policeman. Did the [97] policeman talk to you?

A No.

Q Did the policeman talk to anybody in your presence like James' brother?

A No.

Q Did she tell you that a policeman ever talked to her?

A No.

Q Do you know Lester Watson?

A Who?

Q I can't hear you.

A What did you say?

Q Do you know Lester Watson?

A Not that I know of.

Q You don't know him. On June 23, 1969, you did not know him that day, either, did you? I don't hear you, sir.

A I don't know.

Q On June 24, were you in attendance at James Drope's trial in this city?

A I went there.

Q You went there?

A Yes.

Q On that day was he represented by a lawyer? I don't hear you, sir.

A I don't know.

MR. WILLIAMS: Not that you know of. No further questions.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Mr. McCleary, let me just ask you a few questions. Just think about them and answer them truthfully and as you remember things. Don't be nervous. Okay? Now, did you come [98] to the house that morning with Mr. and Mrs. Dewey, over at Homer Case's? Did they pick you up and bring you over there?

A When?

Q On the morning that James was shot, did you come with Mr. and Mrs. Dewey and Jim over to Homer Cases' house? Do you remember? How did you get over there? Did you drive yourself?

A Bus.

Q Bus. You don't know Lester Watson, you don't know who we are talking about, do you?

A No.

Q When you were at the hospital on that day of the 25th, did you see some guards that look like policemen around the hospital? There were guards at the hospital, City Hospital?

A No, sir.

Q Well, now let me ask you this: Did you at any time see the policeman talking with James Drope while you were there?

A No.

Q No policeman talked to you as you recall?

A No, sir.

MR. WEISS: That's all the questions I have.

RECROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. McCleary, when you went over to that hospital they took James Drope into a room, didn't they, wheeled him [99] right into a room, didn't they?

A Yes.

Q Closed the door, didn't they?

A I don't remember.

Q You don't remember.

THE COURT: Now, let me ask you a question. Did any member of the family report that someone has shot him?

THE WITNESS: No.

THE COURT: Why?

THE WITNESS: I don't know.

THE COURT: All right. Let's proceed, gentlemen. This witness I don't know whether it is a mannerism, but he is very reluctant to answer any questions. He doesn't seem to know any more than he helped the man over to the hospital.

THE WITNESS: That's all I know.

MR. WILLIAMS: No further questions.

MR. WEISS: That's all the questions we have.

(Witness excused.)

THE COURT: All right. Do you have any more witnesses?

MR. WEISS: Yes. We have the defendant.

THE COURT: Well, how long will it take?

MR. WEISS: I have no idea, Your Honor. It won't take a long time with me. I don't know about what the cross-examination is going to be.

THE COURT: All right.

MR. WEISS: At this time, Your Honor, we would like [100] to call James Edward Drope to the stand.

JAMES EDWARD DROPE, of lawful age, the movant herein, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEISS:

Q State you full name, please.

A James Edward Drope, D-r-o-p-e.

Q Where are you residing right now, Jim?

A Right now, at the present time at the City Jail.

Q Before you were brought down from City Jail, where were you?

A Missouri State Penitentiary.

Q Are you serving up there under the conviction for the rape of Mary Ann Drope?

A Yes, sir.

Q What was your sentence in that case?

A Remainder of my natural life.

Q Jim, at that time do you recall an incident that happened wherein you were accused of raping Mary Ann Drope?

A I beg your pardon?

Q Do you recall the incident out of which you were accused of raping Mary Ann Drope?

A Well, all I really—all I can understand is what is in the transcript I have been able to study since this.

Q Do you recall the date on which this incident arose, sometime in January of 1969?

A Yes, sir.

[101] Q You were subsequently arrested by the police; is that right?

A Yes, sir.

Q Now, James, did you retain counsel to represent you on this charge, the defense of this charge?

A Did I retain an attorney?

Q Yes.

A Definitely not.

Q Who retained or did you have an attorney?

A I didn't retain no attorney until after I had made bond.

Q Did you have an attorney up until the time you made your bond?

A They say I had a court appointed attorney that talked to me, but he made no sense.

Q Do you recall what his name might have been?

A No, sir.

Q Do you recall what day you made bond?

A Seems to me like right around February 29th, I'm not sure.

Q For the last of February you made bond, up until that time, were you in jail?

A I was in City Jail for a while, then transferred to the City Workhouse.

Q You were confined up until the time you made bond, the last of February; is that correct?

[102] A That's right.

Q After you were released on bond, then did you obtain counsel?

A My mother by that time had obtained counsel for me.

Q Would you tell the Court the name of that counsel, please?

A Lester Watson.

Q Do you recall the first time you talked to Mr. Watson?

A Not right down to the date.

Q Were you still in jail?

A No.

Q You were out of jail the first time you talked to him?

A Yes.

Q Do you recall the approximate length of that first conversation you had with him?

A Approximately ten, fifteen minutes at the most.

Q Now, did you talk to him any other times personally, face to face, after that first time?

A Yes, sir.

Q When was that, do you recall?

A That was when he had me bring my wife out to see him, because my wife had told me to tell him that she wanted to see him.

Q You and Mary Ann then went out to see him?

A Yes, sir.

Q That was the second time you talked to him?

A Yes, sir.

Q How long did you spend out there at that time?

[103] A He talked to my wife for approximately thirty minutes.

Q Were you in the same room when he was talking to her?

A No.

Q You were in another room?

A Yes, sir.

Q You don't know what he said to her?

A No.

Q Did he talk to you alone or with Mary Ann?

A Just long enough to introduce her. When they come out together, then he wanted me. He told me that Mary Ann had suggested me go see this Dr. Shuman, wanted to know if I would consent.

Q So you went to see Dr. Shuman after this meeting?

A Yes, sir. I think it was approximately the following week, because I didn't have no money to give no doctor.

Q All right. Now, after seeing Mr. Watson on this second occasion and after your examination with Dr. Shuman, did you see Mr. Watson at any other time?

A Only to give him money. I tried to talk about the case with him. He said he'd take care of that later. We got plenty of time.

Q How much money did you personally give Mr. Watson, do you know?

A Let's see, in the neighborhood of around three, three fifty, something like that.

Q Three hundred and fifty dollars, maybe?

[104] A Approximately.

Q Was this all in cash?

A Yes, sir, except for one—I'll take it back. It was a payroll check. One of the companies I had been driving

for, they pay us daily because I was working out of the hiring hall and I just signed and gave it to him.

Q Now, Jim, did Mr. Watson ever call you, bring you in to talk about what happened on that night?

A Well, just very vaguely. Let's see, one trip I went out there and talked to him very vaguely. He said he wanted to get this report back from the doctor before he did discuss anything with me.

Q Did you suggest any witnesses that might testify in your behalf to him?

A Yes, sir. That morning there was a big squabble, because Your Honor here was upset over him not showing up. He was supposed to have known the hearing was that date. I found out by accident it was that day, through my father-in-law.

Q He didn't tell you that you were supposed to be on trial June the 23rd?

A I was informed in Judge Walsh's court that they had continued, gave me—granted me the continuance until September. The state was making arrangements for further psychiatric examinations and there was supposed to be a sanity hearing.

Q Who so informed you of that?

[105] A Beg your pardon?

Q Who informed you of that?

A Mr. Watson. I was sitting in the courtroom at the time, but when we got rushed into court well, I just didn't know what the heck was going on.

Q How many times do you think you talked to Mr. Watson from the time he was obtained to represent you until the time of trial?

A Not more than half a dozen times at the most.

Q Now, James, during that day of trial, the first day, June 23, were you able to talk to Mr. Watson other than for the sole purpose of him informing you that you were going to go to trial that day?

A I didn't quite catch that, sir.

Q Pardon me?

A I didn't quite catch your question.

Q Did you talk to Mr. Watson at all about your case

on June 23, except for the fact that he told you you probably wouldn't go to trial that day?

A Nothing other than that.

Q You weren't able to talk to him on June the 23rd at all?

A Your Honor here, Mr. McMullan I think his name is, him and the prosecuting attorney at the time were in some kind of hassle over improper motions and all this stuff. That's all I can say. I didn't quite understand [106] it either.

Q Did they at any time ask you to plead guilty?

A Yes, sir. I was asked at the back door of the courtroom, Division 19, I do believe, by Mr. Watson—Your honor here had—Mr. McMullan had stepped out of the courtroom with the prosecuting attorney and my attorney, and it was my impression that they went to the judge's chambers for a conference, for a recess they called it out in front of me, and when they returned, to the best of my knowledge, standing at the back door of the courtroom, this door right here, and he says, "I advise you to plead guilty to ten years, they're offering you ten years to plead guilty or they are going to throw the book at you." But I said, "Let them throw the book at me. I'm not guilty and can prove it. I'll have my witnesses here in the morning. You just see that you put them on the stand."

Q All right.

A I never saw Watson after that, to the best of my memory.

Q He talked to you that night after the trial?

A He came back to the back, he said, "I'll see you tomorrow."

Q See you tomorrow?

A Yes.

Q He didn't ask to talk to you about the trial or any witnesses or anything?

A No. He just told me [107] "Be sure to have them here." I said, "You just be sure to put them on the stand." I would have them there.

Q James, after you were convicted, were you given any type of psychiatric examination?

A Afterward?
Q Yes.
A That would have been after I got into City Jail?
Q Yes.
A No, sir, not to my knowledge.
Q You had seen Dr. Shuman in February; is that correct?
A I couldn't swear to the exact date, but it was February.
Q Did he give you some medication?
A Yes, sir.
Q Were you taking that medication?
A Yes, sir. I even had some right there in the courtroom, because I was so nervous I couldn't see straight and I couldn't make sense out of what they were talking about.
Q Did you take medication in the courtroom?
A Yes.
Q Was this the day before you shot yourself?
A I don't know whether I shot myself or not. I couldn't swear to that part, but I had been on medication all along. The doctor, the best I can recollect had told me not to take it unless I needed it.
Q After you were convicted in the penitentiary, Jim, did you ask Mr. Watson to appeal your conviction for you?
[108] A Yes, sir, I had, but this wasn't after I was in the penitentiary, this was right in the courtroom. He said he was going to appeal it. Well, he told me he would appeal it and I should be coming up, having a hearing in the Supreme Court in December, and then they carried it on until January. I had heard nothing through January, so I talked to some fellows up in the institution up there and I was advised to write to Marion Spicer, Supreme Court Clerk, and request this information and to find out if he had anything where I was the defendant on this docket. At that time, no. So I filed an untimely notice of appeal with the help of the C Hall clerk, which is the dorm I'm in, and I had filed this, an untimely notice of appeal, then we proceeded from there. They appointed Lester Watson to represent me again. I tried to take and get him off

the case, but I couldn't. I didn't find out until recently how to get a lawyer off the case.

Q Jim, you were present at the first day of trial when Mary Ann testified; is that correct?

A Yes, sir.

Q You went home that evening, got up the next morning, went over to Homer Case's house; is that correct?

A I left the courtroom—I beg your pardon. I left the courtroom.

Q Now, James, you went over the next morning; right?

A Yes.

[109] Q When you were over there, what do you remember happening?

A I remember playing with the kids and getting them up, the best I can remember. I took them, changing the baby's diaper—

Q You were changing the baby's diaper?

A I had all the children at my brother's house at that time, because my wife, you couldn't depend on her to take care of them while I was away from home, and my mother had stated to me that I better hurry up and get dressed, because I was going to be late for court. I said all right. I had to go to the basement to get my clothes and get the kids a change of clothes. Well, I went to the basement. I don't remember coming back out of that basement.

Q Do you remember being in City Hospital at all?

A No, sir.

Q Do you remember signing your name to any "consent to operation"?

A No, sir.

Q Do you remember talking to any doctors?

A No, sir.

Q Do you remember talking to any policemen?

A No, sir. Now, what I mean, that is pertaining to the City Hospital over on Lafayette, when I came to out here at Homer G. Phillips Hospital, I do believe it was on the second day of July, I thought it was the same day. I told them I had to get up, I had to get

my clothes on, I had to [110] get my clothes on and get in court.

Q You told them this?

A Yes, because I thought it was the same day. Then when I started to get up, then that's when I first really knew what had happened, you know. There was a policeman at the foot of the bed. He told me, he said, "You lay still. You'll tear them stitches off." "What stitches?" I got to feeling, you know, and he said that, "Well, man, you been shot."

Q This was over at Homer G. Phillips Hospital?

A Homer G. Phillips Hospital.

Q Some days after the time—

A This was in the month of July. In fact, it was the day before Lester Watson had come out to see me. They held me incommunicado out there. I wasn't allowed to see my people or anything. My mother, she got—supposed to be a court order from Mr. Watson—well, he let my mother see me one time, and then they pulled—they said, well, the court order was supposed to have been forged, because they wouldn't let my mother in to see me no more.

MR. WEISS: That's all the questions I have at this time, Your Honor.

CROSS-EXAMINATION

BY MR. WILLIAMS:

Q Mr. Drope, when you were first arrested in this case, do you remember that?

A I remember very [111] vaguely. What actually took place, I have no idea what proceedings I went through. They did not advise me of no constitutional rights or anything like that.

Q They didn't advise you of your constitutional rights?

A No. Which the officer stated on the stand he did.

Q How many times did you go to court in this case, do you remember?

A Offhand, I really couldn't tell you exactly.

Q You say your mother got Lester Watson as your lawyer?

A Yes, sir.

Q And he advised you to go out to see Dr. Shuman?

A Yes, and my wife.

Q You went out to see Dr. Shuman; isn't that correct?

A Yes, sir. My wife drove me out there to see this doctor.

Q And after you saw Dr. Shuman, did you speak with Lester Watson again?

A It was sometime after that. I had taken money out to give him, trying to do my best to take care of the family, which is hard to do, trying to pay a lawyer and a bondsman.

Q Do you remember that you did have a lawyer and you did have a bondsman?

A Yes, sir. It was through my bondsman I found out that they had rushed my trial up to June 23rd from September.

Q Were you present in court on May 27th of 1969? [112] A Yes. It seems like, I think, it was Division 16.

Q Where do you think that was?

A In Judge Walsh's court.

Q In Division 16?

A I'm not positive.

Q Was Lester Watson with you that day?

A He wasn't there at the present time. I had to wait and wait and finally he got mad and he went back and talked to somebody, I don't know, judge, the prosecuting attorney or whoever he was, but I know it was Judge Walsh's court.

Q On that day you were out in open court, isn't that so?

A Yes.

Q Did you speak with Lester Watson after leaving court that day?

A No. He said that he would call me later. They were going to take and make arrangements for me to see a psychiatrist and that the trial would be continued to September.

Q Well, didn't they announce in court that very day, on May 27th, that the next date would be June 23rd,

and that the motion for the psychiatric examination had been overruled?

A I really don't know.

Q You didn't hear that?

A No.

Q Now, earlier you, in testifying to counsel's questions, you said that the prosecutor and Lester Watson [113] and the Court was in an argument and the Court said that the motion was improper?

A They had come to the conclusion that it was filed in improper form. No fault of mine. I'm no lawyer.

Q It was improper?

A Well, that's what your lawyer here stated.

Q And therefore the case would not go over to September, but you would go to trial on June 23rd.

A Well, the Judge here, he stated to the lawyer, the best I can recall, that he should submit this form, you know, properly, and that he had had sufficient time to do so. Now, I don't know when he had to submit it or anything. I don't know just what the scuttlebutt was.

THE COURT: You keep pointing at me. That was 16. Was that Judge Walsh?

THE WITNESS: Judge Walsh's court.

THE COURT: You are talking about two different situations. You are talking about when you were in 16 and when the case was continued.

MR. WILLIAMS: That's about the motion.

THE WITNESS: I'm talking—

THE COURT: Just a minute.

MR. WILLIAMS: He was recalling what happened on a motion.

THE COURT: What motion?

[114] MR. WILLIAMS: In 16.

THE WITNESS: This was in this man's court, this fella's here.

THE COURT: That's what I am trying to tell you, counsel, if you will listen, that he is talking about me and you are talking about Judge Walsh.

Q You recall being in Judge Walsh's court?

A Yes, sir.

Q Do you recall Judge Walsh saying something about the motion being improper?

A No, sir.

Q You don't recall that?

A No, sir.

THE COURT: Not Walsh, but this Judge.

Q I see. How did you come to court on June 23rd, do you remember?

A Yes, sir. I had had, I had went downtown to my in-laws, give my clothes for my babies and some for myself, I didn't have any more clean to wear to work, and the kids didn't have any more, so I went down there and I was talking to John Devoso, Mary Ann's stepfather who at the time was my stepfather-in-law, and he said he had to go to court tomorrow. I said, "What have you done to have to go to court?" And he said, "Well, it's on this mess with Mary Ann." I said "Yes". He said "Well, haven't you been notified?" I said, "No." And so I called my lawyer. I can't reach him. So I called my bondsman. I asked him to check into this, and so he said, "Well, meet me down there." [115] I said, "I hate to lose the work, because I need the money." He said, "Well, just in case they have set it up on you. According to my records you're not supposed to be up until September." He said, "But just in case, wait downstairs. I'll meet you down there and let you know." That's when he come down and told me that they were going to start the trial.

Q Well, you do recall being in court on May 27th, in Judge Walsh's court?

A Yes. I was there with my stepfather.

Q Right. Now, do you recall the trial starting?

A On June 23rd.

Q You recall June 24th?

A Very little of June 24th, up until the time I went to get the—change the clothes.

Q When did the shooting take place? Do you know that?

A Well, to the best of my knowledge, it happened in the basement. I had woke my baby brother up and sent him upstairs. My brother told me to have—to get him up and come on up because he was supposed to help my sister-in-law take care of the kids that day, while I was at court, you know. So I got up, went upstairs and I was getting my clothes together, getting ready to clean up, change the kids, before I went into court that

day, and I wrenched around, the best I remember, I turned around and turn the light off. When I turned around something hit me in the stomach and I [116] pulled away and I had a hot, burning sensation going through my stomach. That's the last I remember until I woke up in Homer G. Phillips Hospital.

Q Do you remember any testimony in your case?

A Only very, very vaguely. Some my wife said that set me off, because my lawyer was sitting right there with me. I already told him some of the things that she said on the stand were just an outright lie and we could prove it.

Q So you were able to discern what was going on when the witnesses were testifying and you told your lawyer?

A That was the only witness that got on the stand that I can recall that said anything that I could make any sense out of.

Q Do you remember testifying here today, saying that a police officer testified that he had told you what your rights were, but you said he didn't tell you?

A That he didn't tell me. That's what I'm trying to tell you. This was all right there with Mary Ann.

Q But you remember that this officer did testify to that?

A Yes.

Q Did anyone else testify, that you recall?

A It seems to me like there was Mary Ann and the police officer. I couldn't swear to the rest of them, but it seems like there were some others.

Q Mary Ann was the chief witness, wasn't she?

[117] A Yes.

Q And she sat and pointed you out as being one of the persons that raped and sodomized her, didn't she?

A I don't think she pointed me out. She said, yes, sir, that I was her husband, James Drope, the best I can recall.

Q The best you can recall?

A I don't know, I don't recall exactly how it was said, but this, I think, is what I read in the transcript in order to try to refresh it.

Q Do you remember the name of Tuttle?
A Who?
Q Tuttle, Rayborn Tuttle.
A I don't recall hearing this there.
Q Do you know him?
A Rayburn Tuttle, I have know him ever since he was a baby.
Q Did you know Roger Butler?
A Yes, sir. I've known him about nine, ten years. They was all the time bringing cars over to the house for me to help them work on.
Q Did you hear your wife testify that you and they came to the house and you pointed a gun at her and knife at her and all of you raped and sodomized her?
A I remember all of this from just reading back over this transcript. Now, I have been going over it ever since I was able to obtain it. All I know is just what is—just what I read about it. Really, when it comes right down to it, [118] I still ain't got no clear picture of it.
Q When you were arrested the first time, back in January, did you know why you were being arrested?
A They didn't state why I was being arrested.
Q They didn't tell you that you were being arrested for rape?
A No. I never was told that I was arrested.
Q You remember coming to court, the three C's court?
A Yes. I remember going back to see the judge, I remember being transferred from the jail to the workhouse.
Q Did anyone ever tell you why you were coming to court?
A It was read off when I came into court. They had five different charges, so they said. I don't know.
Q And these charges involved your wife, did they not?
A Yes.
Q Do you remember that?
A Well, I remember what they read off.

Q You remember what they were read off. Do you remember going with your wife to Lester Watson's office?

A My wife had, see, my attorney like I stated before, my attorney had said that he would like to see her, so I took her with me to see him.

Q At that time wasn't it for the purpose of her signing an affidavit to the effect that she would not prosecute you for this crime?

[119] A She had mentioned it, that she didn't want to prosecute, yes, many times. In fact, the day I got out of the workhouse she came to my mother's house and asked me to come on back home, to forget it. The only thing she was interested in was trying to take and get along, for us to try and make a home for our children.

Q So then you did know why you were coming to court, didn't you?

A I knew what I was charged with, yes, after I had been in court for the arraignment.

Q And after you mother obtained Lester Watson for you, he told you what you were charged with, didn't he? He told you what you were charged with, didn't he?

A He only mentioned one—one charge. It was for being charged with forcible rape.

Q That's what you were charged with, that's what you went to trial on; wasn't that so?

A They said they was trying me for aiding and abetting the commission of a crime. Not forcible rape.

Q Do you recall how Buttle and Butler were involved in this thing?

A Beg your pardon?

Q Do you recall how Tuttle and Butler were involved in this?

A Do I recall how they were involved?

Q Yes.

A We were all out drinking in the back yard of my house at the time that I was living at 79—1607 Hickory Street. When we moved there, after the [120] house was damaged, the police asked me to keep a close eye on it, see that it stays nailed up.

THE COURT: It's after 1:00. Is this going to take all day?

MR. WILLIAMS: I am just about finished, Judge.

THE WITNESS: And so I had gone to the grocery store by my house, I went and got the groceries, went on down and checked the house. While I was there I went over and started drinking again at the tavern, beer and whiskey, and came back to the car and—

THE COURT: Keep your voice up.

THE WITNESS: I got beer and whiskey and took it out and—what was the question again?

Q You were in the backyard drinking with these two men?

A They came to the car later, you know. I sat there for quite some time, they came up and bummed me for a drink. I said I haven't got any money to buy some more. If you drink my beer, buy some more. This was, I guess, around 7:00 somewhere. This just continued long after the taverns closed. We decided we'd go to East St. Louis, but I had to take my groceries first.

Q You brought them along with you home?

A Yes, sir. We were supposed to proceed on over to East St. Louis after I took my groceries home.

MR. WEISS: Your Honor, I would like to object to [121] any further testimony along these lines. We are not here to try him over again for the crime. We are merely here to determine whether he was competent at the time of trial.

THE COURT: Sustained.

MR. WILLIAMS: Pardon me, Your Honor.

THE COURT: I sustain the objection.

MR. WILLIAMS: I wasn't going any further along this line, anyway, Judge.

Q Mr. Drope, these papers that bring you before the Court today, did you prepare them yourself?

A Not solely by myself.

Q Pardon me?

A There is a party who helps me do all of the research and everything on this. In fact, two of them. Most of the typing I have done, that I could. If the

court wishes their names, I'll gladly subpoena them in here.

Q No. I was just wondering whether you did it all yourself. Are you receiving now any medication from the hosiptal up there?

A When I get nervous I do get medicine from the hospital.

Q When was the last time you took any medicine?

A Night before last.

Q You don't feel nervous today, do you?

A Yes, sir.

[122] Q Pardon me? Well, are you usually as composed as you are today?

A Beg your pardon?

Q Without taking medicine?

A What?

Q Are you usually as composed as you are today without taking medicine? You haven't had any medicine today, have you?

A Nothing but aspirins.

Q Nothing but aspirins. I have no further questions.

THE COURT: Do you have any further questions?

MR. WEISS: A few questions, Your Honor. Bear with me just for a minute.

THE COURT: I'm not trying to rush you, but it is 1:15. If you are going to take long, we'd better have a noon recess.

REDIRECT EXAMINATION

BY MR. WEISS:

Q Jim, a transcript, a copy of the transcript you sent to me; is that right?

A Yes, sir.

Q And since you have been in prison, how long have you had this transcript?

A Not too awfully long.

Q How long?

A Not too long. After the attorney had filed, Lester Watson had filed he—

Q You had it for a year?

A I couldn't really say it was a year.

Q How many times do you think you have read it?
A I have read it from cover to cover, I guess, eight, [123] ten times.
Q Okay. Since the time, between the time this incident occurred, out of which you were charged, the rape of Mary Ann, between that time and the time of your trial, did you live with Mary Ann at any time?
A Yes, sir. We never was apart more than a couple of days.
Q Did you live back in the house you lived in before this incident took place for which you were charged?
A Are you referring to the one on St. Vincent?
Q Wherever your home was.
A We moved. After I got out of the workhouse, she came down and begged and pleaded with me to come back to her, that she would forget it all. Well, I went back and we moved the stuff out, my brother and I, Homer Case and Donald G. McCleary, and I'm pretty sure there was another party helping us. We moved all of the stuff to 7918 South Broadway.
THE COURT: Pardon me. What all this have to do with this?
MR. WEISS: I just wanted to establish the fact that he did live with Mary Ann after this incident took place. He was cross-examined—
THE COURT: All right.
Q Between the time you were charged with this incident we are talking about, the rape of Mary Ann, and the [124] time of your trial, had you gone out to Malcolm Bliss at any time for treatments?
A Yes, sir. I didn't have any money to buy the medication, so I went—like Dr. Shuman had advised me, to go down there. They had better, more qualified physicians to take care of it.
Q How many trips do you think you made down to Malcolm Bliss between the time you saw Dr. Shuman and the time of the trial?
A Sir, really, I couldn't say.
Q More than once?
A Yes, it was more than once.
Q Less than five?

A I couldn't swear to it.

Q Did Lester Watson ever discuss a plea of insanity with you?

A Beg your pardon?

Q Did Lester Watson ever discuss a plea of insanity with you?

A No, sir.

THE COURT: Was there any treatment shown in the hospital record just prior to this trial?

MR. WEISS: At the hospital?

THE COURT: Yes.

MR. WEISS: No, Your Honor. That's all the questions I have at this time.

THE COURT: All right. Do you have any questions?

MR. WILLIAMS: No. No, Your Honor.

[125] THE COURT: All right. You may step down.

(Witness excused)

MR. WEISS: Your Honor, before we close this hearing today, there were two witnesses that I intended to call for this hearing. One was Lester Watson, who has been ill for the past several months, who is confined to home and who could not be present here today, and also I planned to call Mrs. Frankie Dewey, who, according to the police reports, testified on the motion for a new trial in this case. It was alleged that she had reported the incident or at least discussed the shooting incident and I wanted her to testify to clear this up. She has had a heart attack within the last two weeks and is confined to bed and could not be here also. I wonder if I could have leave of the Court, with the permission of the prosecutor—he doesn't have to give me that, but to take her deposition and Mr. Watson's, rather than recess or continue this hearing and have them take the stand.

THE COURT: That seems reasonable.

MR. WILLIAMS: Well, Your Honor, if they are unable to appear—

THE COURT: We will mark it partially heard and past for the purpose of permitting counsel for movant to take depositions which will be submitted to the Court after they are taken.

[126] MR. WEISS: I would also like permission from Your Honor to file a brief and have about thirty days to file.

THE COURT: Well, when you file the depositions, if at that time you request some time for filing a brief it will be granted.

MR. WEISS: Thank you very much, Your Honor.

MR. WILLIAMS: At this time I would like to move that the Court take judicial notice of the other file in the official court transcript of the trial.

THE COURT: Well, the transcript of the trial proceedings will be considered as in evidence.

MR. WEISS: I would like that very much, Your Honor.

THE COURT: All right. Also the report of Dr. Shuman; is that correct, gentlemen?

MR. WILLIAMS: Right.

MR. WEISS: Yes, Your Honor.

THE COURT: And also the minutes of the clerk's office in the original file ought to be in evidence. That is in Cause No. 405 R, to show the time these incidents occurred, requests for continuance and stuff like that.

MR. WEISS: I think that is correct.

THE COURT: And also the testimony that was taken after the motion for a new trial was filed with reference to the voluntariness or involuntariness of defendant being in [127] court; is that correct?

MR. WEISS: I think that is a part of the transcript.

MR. WILLIAMS: Of course, I ask that the Court take judicial notice, and I think counsel asked earlier, of the decision of the Supreme Court in this case.

THE COURT: I think that will be part of the record.

MR. WEISS: The records of the City Hospital, could we withdraw them and keep them in the custody of the City Hospital Record Librarian, Norma Snowden, in case on appeal we would need them.

THE COURT: Yes. The Court will be adjourned until tomorrow morning.

(Hearing concluded.)

* * * *

[Caption and signature omitted in printing]

STATEMENT OF FACTS, CONCLUSIONS OF LAW AND ORDER

MCMULLAN, *Judge*:

The movant, James Edward Drope, filed his Motion to Vacate Judgment and Sentence pursuant to Supreme Court Rule 27.26 to set aside a life sentence which was imposed after a trial by jury on October 21, 1969. The movant was charged with two others with rape and one co-defendant pled guilty and movant here and one other were tried separately and each found guilty of rape.

The judgment against movant, hereinafter referred to as Mr. Drope, was affirmed by the Missouri Supreme Court in the case of *State* v. *Drope*, 422 SW 2d 677 and for additional facts reference is made to that decision.

It is contended by movant that:

1) he was entitled to a psychiatric examination to determine his competency to be tried, convicted and sentenced and

2) that he failed to receive effective assistance of counsel and

3) his constitutional rights were violated by the failure to order a psychiatric examination and by conducting the trial and receiving the verdict in movant's absence.

Lester Watson, an attorney, was retained for and on behalf of the defendant and entered his appearance as the attorney for the defendant Drope and handled the case from arraignment to its conclusion. After an interview and consultation with both his client, Mr. Drope, and his wife, the prosecuting witness, Mr. Watson arranged for a psychiatric evaluation by Dr. Joseph S. Schuman a report of which psychiatric evaluation was dated February 22nd and is in evidence. The record shows that the case was set for April 26, 1969 and continued as to all defendants to Monday, May 26, 1969 and the record further shows that following a motion for a continuance, which was filed on May 27, 1969 the case was continued on May 29, 1969 for the defendant to

June 23, 1969. On May 27, 1969 the defendant's counsel filed the following motion:

MOTION FOR CONTINUANCE

> Comes now the defendant, JAMES E. DROPE, and states to the court that he has had a psychiatric examination made by Dr. Joseph F. Shuman, M.D., a copy of which report is attached hereto.
>
> Defendant moves the court to continue his case until September, 1969 in order that he might receive an examination, evaluation and psychiatric treatment, as suggested by Dr. Schuman, at the Malcolm Bliss Hospital in the City of St. Louis, Missouri.'

On Monday, June 23, 1969 the case was assigned from the assignment division to division number 19 for trial and over the objection of defense counsel the case proceeded to trial. The record shows that the attorney for the defendant after the cause was docketed, called and assigned to Division 19 for trial did orally request a psychiatric examination in that he stated orally 'I am objecting to going to trial with this defendant also for the reason that the defendant is not a person of sound mind and should have a further psychiatric examination before the case should be forced to trial.' The trial began on June 23, 1969 and was concluded June 25, 1969, the jury finding the defendant guilty. The defendant was present in Court during the proceedings of June 23 and June 24 but on the morning of June 25 the defendant did not appear and the minutes show the Court was informed that the defendant was in the hospital as the result of a self-inflicted gunshot wound. Actually, the Judge ordered the Circuit Attorney to verify this information. The trial thereafter proceeded without the presence of the defendant.

The motion for a new trial was overruled after a hearing at which evidence was heard upon the question of whether or not the defendant's absence was due to his own voluntary act for the purpose of avoiding trial. After the hearing on the motion for a new trial the Court filed the following memorandum and ruling:

"The only point made in defendant's memorandum in support of his motion for a new trial is the failure of the record to show 'any reasons for defendant's absence during a portion of the trial'.

The defendant was on hand and present during the first and second day of trial and when the court adjourned to June 25th, 1969, for further proceedings. The defendant failed to appear on June 25th, and the court after an hour's wait proceeded with the trial. The information the court received over the phone and which was checked by the Circuit Attorney's Office through the Police Department with the hospital may not appear in the trial proceedings, but it seems ridiculous to urge that the State or the Court should be required to prove that defendant's absence was voluntary. Neither the State nor the Court should be required to play hide-and-seek with the defendant. Common sense dictates that the burden is on the defendant to show his absence was not voluntary; any other rule places the control of the progress of the case in the hands of the defendant and could well lead to bizarre situations and disrespect for the Court.

However, the whole matter *is* in the record. The defendant was the movant in making a record of the cause of his absence at the hearing on the motion for a new trial. The Court finds from the evidence that the absence of the defendant was due to his own voluntary act in shooting himself; done for the very purpose of avoiding trial. In this type of case where the victim suffers an ordeal in testifying, it is all the more necessary for the Court to carefully scrutinize the defendant's conduct in causing his absence from the trial of the case. The victim in this case faced the prospect of testifying to the revolting conduct of four more persons charged with rape as a result of this occurrence.

The Court has reviewed the instructions and the testimony and finds no error in the trial or any reason why the motion for a new trial should be sustained.

THEREFORE, it is ordered and adjudged that the motion for a new trial, having been heard and submitted and considered by the Court, is hereby overruled, and sentencing is set for Tuesday, October 21st, at 9:15 A.M."

It is now contended that Mr. Drope was

1) entitled to a psychiatric examination to determine his competency to be tried, convicted and sentenced;

2) failed to receive effective assistance of counsel; and

3) his constitutional rights to a fair trial and due process were abridged by the failure to order a psychiatric examination and by conducting the trial and receiving the verdict in movant's absence. As to point again urged that the Court proceeded with the trial in the absence of the defendant this matter has been decided by the Supreme Court in its opinion in this case.

A close analysis of the transcript shows that there was no contention before, during or in after trial motions or hearings that defendant did not have the mental capacity to proceed with trial. And as pointed out in the Supreme Court opinion there was no contention on appeal that the defendant did not have the mental capacity to proceed with trial.

Attached to the motion for a continuance was a psychiatric report from Dr. Joseph Schuman which showed that Mr. Drope had been working out of the union hiring hall for trucks and that he was diagnosed as a:

1) Sociopathic personality disorder, sexual perversion.

2) Borderline mental deficiency.

3) Chronic anxiety reaction with depression. It is also to be noted that at the time of his examination by Dr. Schuman, Mr. Drope was well oriented in all spheres and was able without trouble to answer questions testing judgment and that Dr. Schuman did not find any strong signs of psychosis at the time of the examination. The sexual perversion was apparently a part of Mr. Drope's own culture. All this falls far short of indicating that Mr. Drope lacked capacity in the understanding of the nature of the proceedings against him or was not

able to cooperate with counsel. In fact, it may be said that the report of Dr. Schuman indicated quite the contrary. While counsel for defendant at the time of the trial contended that the defendant was not a person of sound mind and should have further psychiatric examination before his client should be forced to trial there is no statement in the transcript nor any showing that Attorney Watson contended that his client lacked the ability to consult with him or did not understand the proceedings.

While the defendant was a truck driver and worked consistently for long periods of time before January 17, 1969 and as his wife testified he worked "half the time" and she denied any knowledge of his loss of the job due to nervousness. She did testify in answer to the question "And at that time didn't you tell me that you felt your husband was sick and needed psychiatric care?" the answer "Yes". There was also some evidence of disputes and trouble accompanied by some physical force between husband and wife but not to the extent to indicate inability to understand the proceedings. There was no recitation of facts upon which a layman could base the opinion that the defendant was insane except the testimony perhaps that he had rolled down the steps but this occurred only two or three times over a period of eight or nine or ten years. Apparently the only thing the Doctor told the wife was that the defendant had some problems and one would suppose in all reason this was not "news" to her. The testimony of the movant on the hearing on his motion under Supreme Court Rule 27.26 as to his observation of the trial showed that he was quite cognizant of the proceedings. There was no showing that Mr. Drope, on June 23 and June 24 acted in any manner that would cause the Court to have reason to believe he lacked capacity to understand the nature of the proceedings against him or to cooperate with counsel.

There was no previous conduct or history brought to the trial court's attention that would lead the court to believe that the defendant lacked such capacity. According to the testimony of defendant's wife, Mr. Drope

worked as a union truck driver and she did not recite peculiar acts or misconduct nor did the attorney for the defendant call to the attention of the court any such acts or misconduct that would cause the court to believe that he did not understand what was going on. There was testimony that she told the Doctor of some very unusual sex acts. One can not say they would indicate a lack of mental capacity to understand the proceedings.

Mr. Watson arranged for a psychiatric examination of his client with Dr. Schuman and interviewed the prosecuting witnesses in his office. Mr. Watson showed a familiarity with the provisions of Section 552 of the Revised Statutes of Missouri as shown by the transcript of the record. If Mr. Watson failed to produce evidence on behalf of his client it is not pointed out what it is. His client by his own voluntary act made it impossible for Mr. Watson to place him on the stand to testify in his own behalf.

The movant testified that he told Mr. Watson that he would produce witnesses at the appropriate time. He gave no names of witnesses to Mr. Watson and even in the hearing on the motion filed under Supreme Court Rule 27.26 failed to reveal persons who could testify in his behalf. If Mr. Watson failed to raise a defense it is not pointed out what it was. Apparently, Mr. Watson was satisfied that the defendant did not meet the test that comes within the provision of mental insanity as outlined in Section 552, R.S. Mo. 1969. The mere fact that he stated that his client was mentally sick is no evidence that Mr. Drope was mentally sick. It has been the experience of the trial courts here that motions for psychiatric examinations have often been made merely for the purpose of delay. It is estimated that almost seventy-five percent of those sent for psychiatric examinations are returned mentally competent.

At the hearing of the motion under Supreme Court Rule 27.26 the movant produced Dr. Joseph Schuman, a psychiatrist who had examined Mr. Drope before trial and whose report is referred to above. Dr. Schuman testified that it is a *possibility* an act of attempted suicide would be reasonable cause to believe that one

might not be mentally competent at the time to understand proceedings about him. He further testified that although he knew Mr. Drope was sent by his lawyer and was charged with the rape of his wife and had knowledge of the trouble that Mr. Drope was in, yet no where in the report did he state the man could not understand court proceedings or aid counsel. The Court finds that Dr. Schuman's testimony with reference to whether or not a Court would be given reasonable cause to believe that Mr. Drope was unable to cooperate with counsel or understand the proceedings was speculative and based merely on possiblities.

Dr. Jon Tek Lum, a psychiatrist, testified that taking into consideration the crime charged and the attempted suicide such a person is in need of at least a psychiatric evaluation to find out his mental condition. The Doctor could not really state whether he needed psychiatric care. He thinks if a man makes a suicide attempt on his life "this is a very serious psychiatric *indication* that the man has a problem and needs to consult with a psychitarist." The Court can not resist the comment at this time that it does not take a psychiatrist to know that such a man has a problem and indicates poor judgment. The commission of the act of which the defendant was proven guilty indicated this. And it can be said to apply to unprovoked attacks on another person. Dr. Lum did not really say that an attempted suicide was reasonable cause to believe that the accused had a mental disease or defect excluding fitness to proceed. At most he stated that "an evaluation was indicated and that a lot of things have to come in, be brought up in an examination to find out whether he is sane, malingering or did it intentionally or if it was due to a true psychiatric disorder."

The movant, Mr. Drope, told how he conversed with his attorney, Mr. Watson (half a dozen times at most), who prevailed upon his wife to come to Mr. Watson's office for an interview and obtain from her a statement to the effect that she did not want to prosecute Mr. Drope. The evidence did show that Mr. Watson conversed with his client, talked to the prosecuting wit-

ness, arranged a psychiatric examination and participated actively in the trial and cross examined vigorously.

Mr. Drope remembered much of what went on at the time of the trial. He claims that he told his attorney that "I will have my witnesses here in the morning. You just see that you put them on the stand."

Mr. Watson was not called as a witness and hence the Court is not advised that he had any basis to believe Mr. Drope was unable to cooperate with him and was mentally diseased or defective within the meaning of Section 552.030 or Section 552.020.

At the end of the hearing counsel for movant advised that he intended to take the deposition of Lester Watson and a Mrs. Franklin Dewey but this was not done.

Conclusions of Law

The case of *Rhafy* v. *White*, 383 Fed. 2d 883, is cited by movant and it is to be noted that during the course of the trial WHITE sat rigid as though "he just was not there." One of his attorneys testified that communication between them had been difficult. There was need of numerous special recesses because of WHITE'S condition. A psychiatrist who was present at the trial testified that WHITE was "barely in control" and was "very close to a psychotic break". WHITE had a long history of mental disturbances with repeated outbursts of violence and many strange incidents of behavior.

In the case of *State* v. *Machavy*, 478 Pacific (2) 787, both the prosecuting attorney and the defense counsel requested a competency hearing and MAHAVY'S conduct before, during and after both trials was sufficient to create a doubt concerning his capacity to understand his peril and to *rationally assist* his trial counsel. No such evidence has been presented here.

Hansford v. *U.S.*, 363 Fed. 2d 920, the defendant was, during the course of the trial under the influence of narcotics which often produces acute brain syndrome resulting in impairment of orientation, impairment of memory and impairment of all intellectual functions.

In *Jacobs* v. *U.S.*, 350 Fed. 2d 971, the defendant pled guilty and at the post-conviction hearing lay witnesses testified to observations which led the Court to order an examination by an independent psychiatrist and if it was determined that the defendant was mentally competent to stand trial on date he pled guilty the conviction was to stand, otherwise to be set aside.

In *Negron* v. *New York*, 434 Fed. 2d 386, the defendant neither spoke nor understood any English and his Court appointed counsel spoke no Spanish which was the language understood by NEGRON. The Court said "It is equally imperative that every criminal defendant possesses 'sufficient present ability to consult with his lawyer within a reasonable degree of rational understanding'." The Court held that he had a right to a competent translator.

In *Carroll* v. *BETO*, 421 Fed. 2d 1065, the defendant had a history of being in the Army and threatened to kill officers and attacked some of them. He had been diagnosed as schizophremia recurrent. He had been placed in shackles and had killed his wife and stepdaughter by cutting their heads off with a butcher knife and had pled guilty nineteen days after the murder and on his admission to the prison was diagnosed schizophrenia, paranoid type.

In *Clonch* v. *Boles*, 419 Fed. 2d 393, a nineteen year old boy pled guilty to rape and received a life sentence. The presiding judge was quoted as saying "This is a pitiful case. I have had this boy examined by two competent physicians and there is no question he is mentally defective * * * an asylum would be the proper place for this boy * * * we have no method of taking care of such cases."

In *U.S.* v. *Silva*, 418 Fed. 2d 328, a nineteen Puerto Rican was convicted of robbery and a confession (which he denied) was introduced into evidence. At a hearing to determine the voluntariness of the confession it was disclosed that within a few days after his arrival at the federal house of detention he swallowed several articles "including a razor blade and pieces of bed springs or bed spring connectors" and he had previously under

gone treatment at various hospitals for psychiatric disorder. He had suffered hallucinations and had made several attempts to commit suicide and a proper motion for a psychiatric examination had been denied.

In *Taylor* v. *U.S.*, 282 Fed. Supp. 166, the trial court denied the post-conviction motion without even a hearing where ther were grounds asserted of mental incompetence which was documented by nine exhibits which described the defendant as "mentally incompetent, agitated state of depression, manifest paranoid, delusions and schizophrenic reaction alcoholic type."

In *Dusky* v. *U.S.*, 362 U.S. 402, the facts were not set out. The upper court agreed with the Solicitor General that "The record in this case does not sufficiently support the findings of competency to stand trial."

In *State* v. *Davis*, 480 Pacific 2d 354, the court was informed in a pre-sentence report that the defendant had an I.Q. of about 60 and had attended a school for mentally retarded and had been a patient at the State Hospital on five different occasions and there was a report that the defendant did not belong in the Arizona State Prison due to his mental deficiency.

The general principle that must guide the court is set out very well in the section in the case of *Brizendine* v. *Swenson*, 302 Fed. Supp. 1011, and need not be again stated here. Suffice it to say that the authorities cited by the movant present stronger evidentiary basis than is present in the case at bar.

Counsel for movant in his very excellent brief states that all of the parties: the defendant, the State and the Court understood that defendant was requesting a psychiatric examination. Actually, the motion states the defendant had a psychiatric examination. Counsel may not be aware of the practice of the Circuit Attorney at the time to consent in all cases to a psychiatric examination whether with or without merit and without looking into the matter further. The record is abundantly clear that the Court did not treat the motion as one requesting a psychiatric examination. In fact, Mr. Watson was told if he seriously contended that his client was mentally incompetent he should file a proper motion.

It is stated in the brief of movant that defendant's counsel was not notified that the movant's case was set down on the trial docket for June 23, 1969. The defendant himself informed the Court that he was to meet Mr. Watson in Court that Monday morning, June 23, 1969. The record shows that on May 29, 1969 a minute entry was made "continued for defendant to June 23, 1969." All trial dockets of the Circuit Court are published and this was sufficient notice. *McGinley* v. *McGinley*, 170 S.W. 2d 938. While Mr. Watson in an effort to get a continuance contended that he did not know the case was set for June 23rd, the Court did not believe he was unaware of the setting. Mr. Watson's mere statement that he did not prepare this case for trial is one so often heard when counsel seeks a delay.

Movant's counsel in his brief states that the Court without any hearing or inquiry proceeded without movant on hearsay that movant had shot himself. The defendant's own counsel so informed the Court. It can be plainly seen by the testimony taken at the hearing on the motion for a new trial that the Court directed the Circuit Attorney through the Police Department to vertify the information supplied by counsel for the defendant.

When Dr. Jon Tek Lum testified in effect that the Circuit Court did not disagree or enter findings different from his conclusions, it would perhaps be more accurate to state that the Circuit Attorney's Office accepted his conclusion of record and therefore the Court entered its order as required in Section 552.030, 552.020. The Court is also cognizant of the fact that the psychiatrist at the State institution located in the City of St. Louis complained they can not understand why some of these defendants are sent by the Court because there is nothing wrong with them and it is a waste of hospital space and the taxpayers money.

Counsel for movant takes the position that the two psychiatrists both testified in their opinion there was sufficient evidence at the trial to cause the Judge to have reasonable cause to believe that the accused had a mental disease or defect excluding fitness to proceed.

A close analysis of the testimony of the two psychiatrists permits no such conclusion.

The psychiatric examination of Dr. Schuman did not supply the Court with reasonable cause to believe the accused "as a result of mental disease or defect lacked capacity to understand the proceedings against him or to assist in his own defense". Mr. Drope was orientated in all spheres. There was no evidence that he was unwilling to cooperate with counsel. There is no credible evidence that he was unable to follow the evidence at the trial or the described events connected with the alleged crime. His statment to police, his testimony and conduct on the motion for a new trial and his conduct and testimony on the present motion all indicate an understanding in spite of his self-serving statement of loss of memory of the time he shot himself. No member of his family was brought forth to show acts and conduct indicating a lack of understanding.

Mr. Drope has not testified that he attempted "to end it all". According to his testimony he was not aware of the situation under which he came to be wounded. The Court does not believe him. The Court made its findings and entered them at the hearing on the motion for a new trial and no evidence has been produced to cause the Court to change that finding and conclusion. It is well known that many persons score low I.Q.'s when examined on historical events, current events, mathematical calculations and other subjects requiring some reading but in the conduct of their lives and within their culture, environment and associations, such persons are not mentally deficient but in some instances, very sharp. Some persons are raised with sexual misbehavior and such acts become a part of the culture, to use the vernacular, it becomes "the fun thing to do". The fact that Mr. Drope shot himself to avoid trial suggests very strongly an awareness of what was going on. He had heard his wife testify to the facts of the crime and had heard two witnesses testify to his admissions and hence was very much aware of, not only the proceedings, but what he had done and the probable consequences. A person does not defend himself against that

which he is not aware of or does not know of. His shooting himself was to avoid the consequences.

In the case of *Pate* v. *Robinson*, 383 U.S. 379, 14 L.ed. 815, Robinson was convicted in 1959 and had a long history of disturbed, violent and peculiar behavior. He was admitted to a hospital in 1952 imagining that he heard noises, saw things, animals, snails, elephants, and this lasted for about two days. Voices threatened him "They are trying to shoot him:. After release from the state hospital Robinson had errational episodes, became more serious and his conduct was such that the police were called to lock him up. He pranced about staring wildly. In 1953 he shot his 18 month old son and shot himself and jumped into a lake. After serving almost four years in prison for killing his son he was released in 1956. He lived with one Flossie May Ward and in the summer of 1957 and 1958 jumped on his mother's brother-in-law and "Beat him up terribly". He later killed Flossie May Ward coldly, openly and in the presence of others without speaking a word.

The Court held that where the evidence raised a "bona fide doubt as to defendant's competence to stand trial the judge on his own motion must impanel the jury and conduct a sanity hearing pursuant to the Statute of Illinois." The Court also held that the defense of his competency to stand trial by failing to demand a sanity hearing was not waived, by failing to demand a sanity hearing. The dissenting opinion concerned the quality of the incompetency that warrant postponing the trial and set out to test "The defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—then whether he has a rational, factual understanding of the proceedings against him". "* * * In short, emphasis is on capacity to consult with counsel and comprehend the proceedings and lower courts have recognized that this is by no means the same test as those which determine criminal responsibility at the time of the crime."

The dissenting opinion further set out "Whatever mild doubts this evidence may construe are surely alayed

by positive indication of Robinson's competence at the trial. Foremost in his own behavior in the court room. The conclusive factor is that Robinson's own lawyers, the two men who apparently had the closest contact with the defendant during the proceedings, never suspected he was incompetent to stand trial and never moved to have him examined on incompetentcy grounds during trial."

Kibert v. *Peyton*, 383 Fed. 2d 966. The petitioner Kibbert was convicted on a plea of guilty on June 4, 1959 and on June 20th Kibbert was transferred to the Virginia State Penitentiary and upon arrival there was immediately committed to its hospital section where the prison psychiatrist diagnosed his condition as "acute confusional state with depressive features" and administered 15 electroshock treatments and on September 18th he was committed to the Southwestern State Hospital for the mentally ill upon the psychiatrist's final diagnosis of "schizophrenic reaction—undifferentiated type." The court said "lay testimony taken in conjunction with the psychiatrist's diagnosis of psychosis made only three weeks after the trial demonstrated that Kibbert was incompetent at the time of the trial. * * * It is evident that the psychiatric diagnosis could not have been other than Kibbert was insane at the time of his trial".

In *Miller* v. *State of Missouri*, 493 S.W. 2d 413, the movant under Supreme Court Rule 27.26 asserted he was suffering from a mental disease or defect at the time of his offense and when he pled guilty on November 26, 1952. The record shows that on November 23, 1952 he was admitted to a hospital "with a history of having cut his left arm with a razor about 9:00 PM the night before while in jail." There were scratch marks on the left forearm with one wound "approximately three and a half cm long and no deeper than the subcutaneous fat" and he was treated and returned to the custody of the sheriff. The record further showed that he was admitted to the Fulton State Hospital on December 9, 1953 and on December 8, 1953 upon declaration of insanity and upon recommendation of the Division of Mental Health, Governor Donnelly suspended execution of the life sentence and ordered him trans-

ferred to the Fulton State Hospital until restored to reason. On May 2, 1956 a diagnosis was made of "schizophrenic reaction connection with occasional rage outbursts in sociopathic personality." Other testimony was heard of the prosecuting witnesses and Dr. Petersen at the hearing upon the motion but the court held that he did not show that at the time of entering his plea of guilty he was incompetent and that the evidence did not show that he lacked the ability to understand and cooperate in October and November of 1952. The Court further stated "neither can it be said the desire for a death sentence proves insanity, incompetency, or inability to cooperate." It is equally consistent with his "attempted suicide as a result of rejection".

In the case *Carpenter* v. *State of Missouri*, 449 S.W. 584, the defendant entered a plea of guilty and in the hearing on the plea of guilty it was called to the court's attention that movant had been confined in the Illinois State Penitentiary and had been given a series of shock treatments for mental illness with a diagnosis of "schizophrenic reaction—simple type, chronic". It was also pointed out and the case was our Supreme Court reversed the denial of relief sought in the motion pointing out that the trial court took the erroneous position that Carpenter's mental condition that the sole test under Missouri law was whether defendant knew right from wrong.

In *State* v. *Drope*, 462 S.W. 2d 677, the court stated "it appears from the record that an improper, or insufficient, motion for a psychiatric examination was filed * * *."

ON COMPETENCY OF COUNSEL

The Court has seen no deviation from the generally announced rule written by Mr. Justice Blackmun when he was on the Eighth Circuit bench in the case of *Slawek* v. *United States*, 413 F. 2d 957:

> ". . . the requirement of the Sixth Amendment is met whenever the accused is supplied with counsel who exercises the judgment expected of one trained

> in the law and committed to the diligent application of its principles; and that a petitioner will prevail on this issue (incompetency of counsel) only if it can be said that what the attorney did or did not do made the proceedings a mockery and shocking to the conscience of the court."

Followed by *Robinson* v. *United States*, 448 F. 2d 1255.

Counsel for movant in his brief states that it is inconveivable how it can be gainsayed that movant received effective assistance of counsel when counsel admits he did not prepare for trial and then he fails to put on any evidence in defense, especially in a widely publicized case where the accused faces the death penalty. In the first place there is no evidence that the case received wide publicity prior to the verdict nor can the Court recall any. Secondly, case after case is tried in our Criminal Courts without any evidence offered in defense. Experienced attorneys, specializing in criminal cases, and trial judges estimate this to be true in over ⅓ of the cases and especially where the defendant has a prior conviction. Thirdly, in a large percentage of cases the Court hears the plea "I am not prepared for trial". If this is to be taken at face value as indicative of ineffective assistance of counsel then indeed will our trial docket become hopelessly bogged down and the Court will be unable to insist upon the trial of cases within a reasonable length of time. If Courts wait for defense counsel to announce "ready" then numerous cases will linger for years. Mr. Watson displayed during the trial of the case itself that he knew what he was doing. His failure to specifically call the Court's attention to the provisions of Chapter 552 of the Revised Statutes of Missouri may have been due to his reliance upon the Court having some knowledge of its provisions.

Movant's counsel decries Mr. Watson's failure to raise the defense of insanity and it seems that this assumes that Mr. Watson failed to evaluate the psychiatric examination and report by Dr. Schumand and the feasibility and prospect of such a defense. Movant's counsel assumes that it was "an obvious crucial defense" and

that there was such a defense. After all, Mr. Watson was advised by Dr. Schuman and did interview his client and the prosecuting witness. Mr. Watson, being experienced counsel, may also have learned from such experience and observation that such a defense is hard to sell to a jury unless the evidence is very substantial. Counsel outlines, on page 42 of his brief, of what the Court was aware of is not borne out by the record and the evidence.

Counsel for movant has been most diligent in accepting this appointment as counsel in this case and filed an exhaustive and excellent brief and for this the Court is indebted to him.

Conclusion and Order

It is the conclusion of the Court that under all of the facts and circumstances of this case and under the law the movant was not entitled to a psychiatric examination to determine his competence to be tried, convicted and sentenced and that his constitutional rights were not violated by the failure to order a psychiatric examination and by conducting the trial and receiving the verdict in movant's absence and that he did receive effective assistance of counsel.

WHEREFORE, movant's motion under Supreme Court Rule 27.26 is overruled.

/s/ David A. McMullan
Judge
June 26, 1972

Filed June 26, 1972

TRANSCRIPT APPROVED

This Transcript is hereby approved this 20th day of July, 1972.

/s/ David A. McMullan
DAVID A. MCMULLAN
Judge

oOo

CERTIFICATE OF REPORTER

I, Joan Hamilton, Official Court Reporter in Division No. 7 of the Circuit Court of the City of St. Louis, State of Missouri, do hereby certify that the foregoing 29 pages are a true and accurate copy of the transcription of my notes taken in the foregoing cause.

/s/ Joan Hamilton
JOAN HAMILTON
Official

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that James Edward Drope, above-named, hereby appeals, in forma pauperis, to the St. Louis Court of Appeals from order entered on June 26, 1972 overruling movant's motion to vacate judgment and sentence filed pursuant to Rule 27.26.
Filed: July 7, 1972

/s/ Charles A. Weiss
CHARLES A. WEISS
Attorney for Movant
500 North Broadway
St. Louis, Missouri 63102
231-8600

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT
DIVISION TWO

APRIL SESSION, 1973

No. 34797

JAMES EDWARD DROPE, MOVANT, APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

APPEAL FROM CIRCUIT COURT OF THE CITY OF ST. LOUIS
FOR CRIMINAL CAUSES

Hon. David A. McMullan, Judge

Opinion Filed: June 5, 1973,
Reported at 498 S.W. 2d 838.

SMITH, *Presiding Judge*:

James Drope appeals from a judgment of the Circuit Court denying relief on his motion filed pursuant to Rule 27.26, V.A.M.R. Specifically, he complains of the trial court's finding: (1) that he was not entitled to a psychiatric examination and hearing before, during, and after his original trial to determine his competency to be tried; (2) that he was not denied due process when the trial court conducted a portion of his trial in his absence; and (3) that he was not denied effective assistance of counsel.

Drope was convicted in June, 1969 of the forcible rape of his wife. That conviction was upheld on appeal. See State v. Drope, 462 S.W.2d 677 (Mo. 1971). The rape charged occurred on January 17, 1969. Drope and four of his friends entered the Drope home at approximately 1:30 a.m. and, threatening Mrs. Drope with a gun, tied her spreadeagled to the bed. They also acquired a knife from the kitchen as an additional coercive device. For

approximately the next two hours they proceeded to have intercourse with her, oral and vaginal, frequently two men concurrently. Each of the four comrades of Drope had both forms of intercourse; Drope himself had oral and rectal intercourse. Drope was present throughout and apparently directed the activities, telling his friends what to do. Upon completion Mrs. Drope was left bound and gagged and, as he left, Drope advised her, "[T]his isn't the first time this is going to happen." Mrs. Drope was released by the eldest of their five children (six years old) all located in the adjoining room, who cut the ropes with a kitchen knife. Drope was apprehended shortly thereafter when he returned home. While in police custody he admitted the activity and said it started out as a "joke." Following a finding of guilty by the jury the court [1] assessed punishment at life imprisonment.

Drope was freed on bond shortly after his arrest and was represented by counsel retained by his mother. Counsel had Drope examined in February 1969 by Dr. Joseph Shuman, a psychiatrist. Dr. Shuman prepared an extensive report after talking with Drope for approximately an hour and a half, and with Mrs. Drope, his wife.

We set out in an appendix that report *in toto* because of its relevance to movant's contentions. Following this report Drope, through his counsel, filed a motion for psychiatric examination which was denied because not in proper form. The case was set for trial, and Drope was present on the trial date. His counsel was not and explained upon his arrival that he understood the matter was not to be set until September (the trial date was June) and his client would be examined prior to trial. Counsel also professed his unreadiness to try the case. Continuance was denied and a jury selected. The next day the evidentiary portion of the trial commenced. Drope's wife testified as well as three other witnesses, two of whom were present in police headquarters when Drope made a statement admitting his participation in the rape.

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[1] Drope was tried as a second offender. Sec. 556.280 RSMo 1969.

The next morning Drope shot himself in the stomach with a .22 rifle. Testimony taken in connection with Drope's motion for new trial was conflicting. His testimony was that he remembered nothing about the incident except the hot pain in his stomach. His witnesses testified he was unconscious after the shooting and did not regain consciousness for some considerable time after his surgery. There was testimony, on the other hand, that Drope was conscious in the hospital and stated that he shot himself to avoid trial and to prevent being convicted for something he didn't do. Drope did have surgery and remained hospitalized for 21 days. Upon learning of the shooting the trial judge ruled that Drope's absence was voluntary and proceeded with the trial. The court's action in doing so was upheld on appeal.

Movant's motion for new trial and the hearing conducted pursuant to it devolved into the production of evidence to establish whether Drope's shooting was voluntary or involuntary. The trial court obviously found it to be voluntary. No psychiatric testimony was presented at the hearing on the motion for new trial.

Upon his hearing on his 27.26 motion, Drope produced two phychiatrists. Their testimony was uncontradicted. Both testified that they were of the opinion that there was reasonable cause to believe that a person who would attempt suicide might not be competent to understand the proceedings against him, if he was in the midst of trial. Dr. Shuman additionally testified there was a possibility that a man could voluntarily shoot himself to prevent continuance of the trial. He also stated that at the time of his earlier examination he would not have believed Drope was contemplating suicide. Both doctors opined that even if the suicide attempt was to prevent continuance of the trial, they would still desire an examination to determine whether the man was competent to stand trial.

Movant's first two points are inextricably woven together and present the question of Drope's mental state during the trial. In his first point he contends the court erred in not ordering psychiatric examination and hearing to determine his competency to stand trial.

Section 552.020, RSMo 1969 provides: "(2) Whenever any judge or magistrate has reasonable cause to believe that the accused has a mental disease or defect excluding fitness to proceed he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private physicians to make a psychiatric examination of the accused. . ."

Paragraph 6 requires that if the results of the examination are contested, or if the judge on his own motion orders it, a hearing shall be held to determine competency. In Pate v. Robinson, 383 U.S. 375 (1966) the statutory scheme provided by Missouri was elevated to constitutional dimensions. There it was held that where at any time during the proceedings reasonable doubt of defendant's competency arose, the trial court has an obligation *sua sponte* to conduct a hearing on competency. The facts upon which such hearing was required in *Pate* were extensive and came to the trial court's attention during the trial as a result of evidence introduced to establish Robinson's insanity at the time of the offense. It included, in part, evidence that (1) Robinson was hit by a brick while a child and thereafter acted "peculiar;" (2) he had episodes of sudden, unexplained violence toward objects and people; (3) he would have frequent dazes and unresponsive periods; (4) he was taken to a state hospital after an episode of violence and was found to be hallucinating and thought someone was after him; (5) he shot and killed his 18 month old son, then shot himself in the head, and then tried suicide by jumping in a lagoon; (6) he killed his common law wife by walking into her place of employment, and stared at her for about a minute and then shot her and another man.

The test of competency to stand trial, unchanged by *Pate*, is stated in Dusky v. United States, 362 U.S. 402 (1960) as follows: ". . . whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as a factual understanding of the proceedings against him." (1.c.402). See also § 552.020 (1) RSMo 1969.

By Missouri statute (§ 552.010, RSMo 1969) mental disease or defect is defined as: "congenital and traumatic mental conditions as well as disease. They do not include an abnormality manifested only by repeated criminal or *otherwise antisocial conduct*, whether or not such abnormality may be included under mental illness, mental disease or defect in some classifications of mental abnormality or disorder. The terms 'mental disease or defect' do not include alcoholism without psychosis or drug abuse without psychosis or *an abnormality manifested only by criminal sexual psychopathy* as defined in § 202.700. . ." (Emphasis supplied).

In determining whether Drope's rights under *Pate* and the Missouri statutes were violated we must examine whether "reasonable cause" existed of movant's competency at three different times—before the trial, during the trial after the suicide attempt, and at the time of the motion for new trial. Prior to the trial the court had only the Shuman psychiatric evaluation upon which to have made a determination. That evaluation does not raise a reasonable doubt of Drope's fitness to proceed. The report reflects Drope did not have "any delusions, illusions, hallucinations, obsessions, ideas of reference, compulsions or phobias at this time." Mr. Drope was "well oriented in all spheres." "He was able, without trouble, to answer questions testing judgment." Abnormal sexual acts are a part of his "culture" and on the basis of the report even if sexual perversion was a form of mental disease in some cases, it apparently is not in Drope's case. The conclusions are that Drope is (1) sociopathic—a synonym for anti-social which is specifically exempted as a mental disease or defect under Missouri law; (2) sexually perverted—again exempted; (3) borderline mental deficiency—but no indication it is severe enough to prevent cooperation and understanding, and the report indicates the contrary is true; (4) chronic anxiety reaction with depression—treated by the doctor with tranquillizers and again indicated as not interfering with Drope's understanding or cooperation and explained as based in part on his legal troubles.

We are able to put little weight on Mrs. Drope's feelings that her husband had mental problems, as that matter bore on his sexual perversions—not his competency. Nor are certain related episodes where he rolled down the steps because he didn't get his way particularly impressive. These episodes occurred only three times in ten years; in each case he immediately arose and the episodes demonstrate pique more than anything.

There is no indication in this record of any actual failure of understanding or cooperation by Drope with his attorney, nor of any lack of understanding of the nature of the proceedings. We cannot therefore find reasonable doubt of competency to order psychiatric examination or hearing before trial.

Movant contends that his suicide attempt coupled with the earlier report established such doubt during the trial. While recognizing that *Pate* was determined upon facts which arose during trial and which the Court concluded required a competency hearing, we are unable to conclude that *Pate* required the interruption of movant's trial for such purpose. Initially, we do not find in *Pate* any holding that the hearing must occur during trial, rather than immediately thereafter. Secondly, *Pate* involved a *competency hearing* rather than a *competency examination* and hearing as is contemplated by the Missouri statutes. It may be practically feasible for a hearing to be held in the absence of the jury during a trial without unduly delaying the trial. But an adequate psychiatric examination could not be made during the trial without requiring a substantial delay in the trial.[2] And it is at least arguable that a mistrial declared *sua sponte* by the judge during the trial, particularly over the objection of defendant, would bring double jeopardy considerations into play if in retrospect the mistrial was an abuse of discretion. See United States v. Jorn, 400 U.S. 470 (1971). We therefore hold that it was within the discretion of the trial court, if

[2] One of movant's psychiatrists testified that a week or more was required to examine a defendant certified for psychiatric examination.

he became aware of doubts of competency during the trial, to delay ordering *sua sponte* an examination and hearing until the close of the case.

We turn to the third time period, the post-trial period prior to sentencing. Once again it is asserted that the suicide attempt coupled with the psychiatric report raised a reasonable doubt of competency requiring an examination and hearing at that point. We will accept *arguendo* movant's contention, inferentially disputed by the state, that Drope's actions in shooting himself was in fact a bona fide attempt at suicide.

We will also accept as true the psychiatric testimony on the 27.26 hearing, that to these psychiatrists, an attempt at suicide would raise a reasonable doubt as to a man's competency to proceed with trial. We note, however, and emphasize, that at no time did these experts testify such attempt established incompetency to proceed but only raised in their expert opinion a doubt. Turning once again to *Pate* we find the following: "The State concedes that the conviction of an accused person while he is legally incompetent violates due process . . . and that state procedures must be adequate to protect this right." (l.c.378).

We do not find in *Pate* any indication that the evidence of reasonable doubt of competence can be elicited in the first instance during a post-conviction proceeding seeking to set aside the conviction. To reiterate, in *Pate* the evidence upon which reasonable doubt was found to exist was all before the trial court during defendant's original trial. In Drope's case, the critical evidence relied upon to establish the reasonable doubt, the psychiatric testimony, was presented for the first time in the post-conviction 27.26 proceeding. At the time judgment was finally entered and sentenced imposed against Drope, the court had before it the pre-trial psychiatric report and the fact of an attempted suicide, and evidence that that attempt was to avoid trial. We are unable to conclude that as a matter of law an attempt at suicide creates a reasonable doubt as to the movant's competency to stand trial. See Miller v. State, 473 S.W.2d 413, (Mo. 1971) l.c. 418. And the expert medical opinion

of psychiatrists of such doubt cannot be imputed to a trial judge where such expert opinion is not before him. The procedures employed for protecting Drope's rights were not shown by movant to be inadequate. We cannot hold the finding of the trial court regarding defendant's competency to be clearly erroneous.

Movant's second point concerning the voluntariness of his absence from trial is largely determined by our ruling on the first point. Upon the evidence which the trial court had before it on the motion for new trial it was a permissible finding that Drope's suicide attempt was a voluntary act to avoid trial and so a waiver of his right to confront his accusers. The Supreme Court so found upon appeal. See State v. Drope, *supra*. The psychiatrist testimony at the 27.26 proceeding that such an attempt might have been the product of a lack of competency does not meet the burden of proof placed upon movant. Again we cannot hold the trial court's finding to be clearly erroneous.

Movant also asserts the ineffectiveness of his counsel. This is based upon (1) counsel's statement that he was not prepared for trial, and (2) counsel's failure to properly assert Drope's incompetence to stand trial. No testimony was presented from movant's trial counsel. He was apparently ill at the time of the 27.26 hearing, but the court left the hearing open to permit counsel's deposition to be taken. Either it was not taken or if taken was not made an exhibit or furnished to the court. The record of the trial does not support counsel's statement of his lack of preparation. Nor are we required to ignore what we know to be true, that such statements are frequently made to support a request for a continuance, as was true here.

Movant also contends counsel failed to present his defenses and failed to call his witnesses. No potential witnesses have ever been identified by movant; no indication of what testimony they might give has ever been presented; and the record indicates Drope was to have the witnesses present in court on the morning he shot himself but apparently did not. Nor does movant delineate any defense which his counsel failed to present, except

possibly insanity. Yet even there the record does not support a conclusion that such a defense was practically available. Neither the report of Dr. Shuman nor the nature of the crime itself demonstrate the availability of such defense. Movant's evidence does not meet his burden of establishing counsel's ineffectiveness due to lack of preparation.

As to the second ground we are once again without evidence to support a conclusion that counsel failed to advance a right of movant which he believed to be meritorious. The record before us is singularly devoid of any evidence that Drope was not in fact able to consult with his lawyer with a reasonable degree of understanding and that he lacked a rational as well as factual understanding of the proceedings against him. Unlike Brizendine v. Swenson, 302 F.Sup.1011 (W.D.Mo. 1969) there is evidence that counsel was aware of the provisions of Chapter 552, RSMo 1969, and made some effort to proceed under them. That he subsequently did not pursue such line of attack does not establish ineffectiveness, for it may equally well be based upon a considered judgment that such an attack was without support or merit. The trial judge who presided at both the original trial and the 27.26 proceeding had an opportunity to observe Drope's conduct and to determine the degree of cooperation existent. Counsel at no time complained of his client's inability to cooperate with him. It must be remembered that incompetency to stand trial is not established by showing the defendant has mental problems. The test enunciated by *Dusky, supra*, and the statute requires more. And in analysing counsel's effectiveness we are not required to ignore the oath which every lawyer in this state takes that: ". . . I will not counsel or maintain . . . any defense except such as I believe to be honestly debatable under the law of the land;" and "will never seek to mislead the judge or jury by any artifice or false statement of fact or law; . . ."

The competency for trial is, in a very real sense, determined by the relationship and cooperation between client and attorney. In the absence of evidence that in fact such cooperation was not present, we are unable

to brand a lawyer's failure or refusal to allege and testify to that which he does not believe to be true as ineffectiveness. Representation of a client does not require or permit subornation of perjury or perjury itself. On the record before us, it is just as plausible to believe that counsel's failure to assert incompetency at the trial and afterward was based upon a factual knowledge that the tests of incompetency to stand trial had not been met, as that it was based upon ineffectiveness. We cannot find the ruling of the trial court clearly erroneous.

Judgment affirmed.

/s/ Gerald M. Smith
GERALD M. SMITH
Presiding Judge

Joseph J. Simeone, Judge, Concurs.

John J. Kelly, Jr., Judge, Concurs.

[Appendix to Opinion Omitted in Printing; The Report of Dr. Shuman is Reproduced Elsewhere in This Appendix.]

IN THE MISSOURI COURT OF APPEALS
ST. LOUIS DISTRICT

APRIL SESSION, 1973

No. 34797

JUDGMENT

JAMES EDWARD DROPE, MOVANT, APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

APPEAL FROM THE CIRCUIT COURT OF CITY OF ST. LOUIS.

Now at this day come again the parties aforesaid, by their respective attorneys, and the Court herein being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment of the Circuit Court of the City of St. Louis for Criminal Causes, denying relief on appellant's motion (filed pursuant to Rule 27.26, V.A.M.R.) to vacate judgment and sentence heretofore rendered therein, be in all things affirmed and stand in full force and effect; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

Filed: June 5, 1973.

No. 34797—James Edward Drope, Appellant, vs. State of Missouri, Respondent.

ORDER

Aug. 16, 1973—Appellant's motion for rehearing or transfer denied.

FOR THE COURT BY /s/ Judge Robert G. Dowd
JUDGE ROBERT G. DOWD
Chief Judge
Missouri Court of Appeals
St. Louis District

IN THE SUPREME COURT OF MISSOURI

SEPTEMBER SESSION 1973

Supreme Court No. 58447

Court of Appeals No. 34797

JAMES EDWARD DROPE, MOVANT-APPELLANT

vs.

STATE OF MISSOURI, RESPONDENT

TRANSFER

Now at this day, on consideration of movant-appellant's Application to transfer the above entitled cause from the ST. LOUIS DISTRICT OF THE MISSOURI Court of Appeals, it is ordered that said application be, and the same is hereby denied.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1973, and on the 8th day of October 1973, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 8th day of October 1973.

/s/ Thomas F. Simon
THOMAS F. SIMON
Clerk

SUPREME COURT OF THE UNITED STATES

No. 73-6038

JAMES EDWARD DROPE, PETITIONER

v.

MISSOURI

ON PETITION FOR WRIT OF CERTIORARI TO the Court of Appeals of the State of Missouri, St. Louis District.

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted.

May 13, 1974

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